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In The

Supreme Court of the United States

MARTHA JANE CLINE, Executrix of the Estate of Jackie Edward Cline,

Petitioner,

v.

ASHLAND, INC., et al.,

Respondents.

On Petition For A Writ Of *Certiorari* From The Supreme Court Of Alabama

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

The Supreme Court of Alabama has interpreted Alabama's statute of limitations to require individuals injured by toxic substances to sue both *within* two years of exposure and *after* they have suffered a "manifest, present injury." In this case, petitioner's decedent Jack Cline was exposed to a toxic substance (benzene), but did not become ill until many years later. He filed suit within two years of becoming sick, but the Alabama Supreme Court dismissed his case on statute of limitations grounds – even though he could not legally have filed suit prior to that time. As the dissent observed, this ruling creates an insurmountable "Catch-22" in which Jack Cline – and other similarly situated Alabamians – have literally *no* time in which to file suit: "no matter when the person attempts to file the action, it is either too soon or too late." App. 37. The question presented is this:

Whether a judicial interpretation of a statute of limitations that gives injury victims *no* time in which to file suit violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were petitioner's decedent Jack Cline (as appellant) and respondents Ashland, Inc., Chevron Phillips Chemical LP, successor in interest to Chevron Chemical Company, LLC, and Exxon-Mobil Corporation (as appellees). Mr. Cline died twelve days after the Alabama Supreme Court issued its decision in this case. His widow, Martha Jane Cline, who has been appointed executrix of his estate, has been formally substituted as appellant by order of the Alabama Supreme Court dated March 9, 2007. *See* App. 111.

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OPINIONS BELOW

The opinion of the Alabama Supreme Court (App. 1-48) is not yet reported. *See* 2007 WL 30070. The unreported order of the trial court (App. 54-55) was entered on March 29, 2005.

JURISDICTION

The judgment of the Alabama Supreme Court was entered on January 5, 2007. App. 49. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

Alabama Code § 6-2-30(a) (1975) provides that "[a]ll civil actions must be commenced after the cause of action has accrued within the period prescribed in this article and not afterwards, unless otherwise specifically provided for in this code."

Alabama Code § 6-2-38(l) (1975) provides that "[a]ll actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section must be brought within two years."

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, art. 1.

INTRODUCTION

The question presented in this case almost answers itself: Whether a judicial interpretation of a statute of limitations that gives injury victims *no* time in which to file suit violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution? Numerous decisions of this Court dating back to the nineteenth century, as well as numerous decisions of state high courts and U.S. Courts of Appeals, have held that a statute of limitations, in order to pass constitutional muster, must afford litigants a reasonable time in which to seek redress for their injuries. In the State of Alabama, however, tort victims who do not become sick until more than two years after exposure to a toxic substance have literally *no* opportunity in which to file a lawsuit: if they file before they become sick, their lawsuit is subject to dismissal on the ground that the cause of action has not yet accrued. *See, e.g., Hinton v. Monsanto Co.*, 813 So.2d 827, 829 (Ala. 2001) (holding that "Alabama law has long required a manifest, present injury before a plaintiff may recover in tort"). If, however, they wait to sue until they have acquired a "manifest, present injury," as *Hinton* requires, then their lawsuit is subject to dismissal on statute of limitations grounds. *Garrett v. Raytheon Co.*, 368 So.2d 516, 521 (Ala. 1979) (holding that a cause of action for injuries caused by exposure to a toxic substance accrues, for statute of limitations purposes, upon *exposure* to that substance, even though the plaintiff's illness does not develop until many years later).

That is exactly what happened in this case. Petitioner's decedent Jack Cline was exposed to benzene manufactured and/or supplied by respondents over the course of many years. Twelve years after the last exposure,

he developed leukemia which, according to his doctor, was caused by the benzene exposure (and ultimately killed him). He filed his lawsuit less than two years after he became sick, in keeping with the two-year Alabama statute of limitations governing personal injury claims. His case was thrown out of court, however, on the ground that, under *Garrett*, he should have filed within two years of his last *exposure* to benzene, even though such a lawsuit would have been premature under the accrual rule of *Hinton*. To quote a recent *New York Times* op-ed article regarding this case, this regime, which deprives Alabama toxic tort victims who do not become sick within two years of their exposure of *any* time in which to file suit, "would have done Kafka proud." Adam Cohen, Op-Ed., *They Say We Have Too Many Lawsuits? Tell It to Jack Cline*, N.Y. TIMES, Jan. 14, 2007, § 4, at 11. Review should be granted to prevent this manifest injustice and square the law in Alabama with the well-settled precedent of this Court, of numerous state courts of last resort, and of a number of U.S. Courts of Appeals.

STATEMENT OF THE CASE

The Petitioner: The petitioner, Martha Jane Cline, is the executrix of the estate of her deceased husband, Jack Cline, who died on January 17, 2007, just twelve days after the Alabama Supreme Court issued its decision in this case. *See* App. 109 (Order Permitting Substitution of Executrix for Deceased Appellant). The cause of Mr. Cline's death was acute myelogenous leukemia, a form of leukemia that is closely associated with exposure to benzene. Mr. Cline was exposed to benzene manufactured and supplied by respondents Ashland, Inc., Chevron

Phillips Chemical LP, and ExxonMobil Corporation, while he was employed as a plant chemist at Griffin Wheel Company in Bessemer, Alabama from about 1968 through about 1987, but he was not diagnosed with leukemia until October 7, 1999, twelve years after his last exposure to respondents' benzene. On April 6, 2001, less than two years after his diagnosis with acute myelogenous leukemia, Mr. Cline filed this personal injury action. App. 2-3.

Alabama Law: The claims asserted by Mr. Cline arise out of the Alabama Extended Manufacturer's Liability Doctrine ("AEMLD"), a common-law doctrine, one element of which is that the plaintiff must establish he has suffered an injury. *Atkins v. American Motors Corp.*, 335 So.2d 134, 141 (Ala. 1976); *Casrell v. Altec Indus., Inc.*, 335 So.2d 128, 132 (Ala. 1976). Logically, then, an AEMLD claim arising out of exposure to a toxic substance cannot accrue before a victim has a manifest, present injury. The two-year statute of limitations for AEMLD claims is established by ALA. CODE § 6-2-38(l) (1975), and the commencement of the limitations period is governed by ALA. CODE § 6-2-30(a) (1975), which provides:

> All civil actions must be commenced after the cause of action has accrued within the period prescribed in this article and not afterwards, unless otherwise specifically provided for in this code.

Despite this clear legislative declaration tying the commencement of the limitations period to the "accrual" of a claim, the Alabama Supreme Court has divorced the two, repeatedly ruling that a toxic tort action does not accrue, and there is no *right* of action, until the victim has a "manifest, present injury," yet simultaneously declaring that the two-year limitations period for such claims commences on last exposure. Because most toxic tort

victims do not have a "manifest, present injury" for many, many years after their last exposure, these two rules effectively deny the vast majority of toxic tort victims any access to court.

This departure from rationality began in 1979, in *Garrett v. Raytheon Co.*, 368 So.2d 516, 521 (Ala. 1979), in which the Alabama Supreme Court ruled that the statute of limitations in a radiation exposure case commenced on the plaintiff's last exposure to the radiation, even though the plaintiff's illness did not develop until many years later. Significantly, the *Garrett* decision neither overruled the well-established principle that a cause of action does not accrue until the plaintiff is entitled to bring it, nor did it expressly establish a distinct exposure accrual rule for toxic tort cases. Instead the majority simply found as a matter of law that an injury had in fact occurred on exposure, without any medical or scientific basis and without any consideration of whether the plaintiff could have filed suit upon exposure. *Garrett*, however, created the wedge with which the Alabama Supreme Court, in subsequent decisions, divorced the commencement of the statute of limitations from the accrual of the cause of action.

Thus, despite its ruling in *Garrett*, the Alabama Supreme Court has continued to apply the ancient rule that a cause of action does not accrue until a plaintiff has a "manifest, present injury." *See, e.g., Thomas v. BSE Indus. Contractors, Inc.*, 624 So.2d 1041, 1046 (Ala. 1993) (dismissing outrage action brought by individual exposed to asbestos but not yet ill). The Alabama Supreme Court reached the same conclusion in *Hinton v. Monsanto Co.*, 813 So.2d 827, 829 (Ala. 2001), which upheld the dismissal of a cause of action for "medical monitoring" by individuals exposed to polychlorinated biphenyls on the ground that

the plaintiff had not yet become sick, and therefore did not have a ripe cause of action. To this day, Alabama continues to adhere to the rule that a cause of action for personal injuries does not accrue until the plaintiff has actually manifested illness.

The combined effect of *Garrett*, on the one hand, and *Thomas/Hinton*, on the other, has created a perversion of justice in the State of Alabama with respect to toxic tort victims whose illnesses do not manifest within two years of their exposure. Under the statute of limitations rule of *Garrett*, such victims are required to sue within two years of exposure to a toxic substance, even though they have not yet manifested any injuries. Under *Thomas/Hinton*, however, their causes of action are deemed premature until they have actually become sick. For such individuals, then, their claims are either too early or too late. There is *never* a time for them to seek redress for their injuries, regardless of the egregiousness of the defendant's conduct or the severity of their injuries.

In this respect, Alabama is entirely unique. Alabama is the *only* state in this country in which a toxic tort personal injury claim is deemed to have accrued, for the purposes of the statute of limitations, before there is a manifest present injury. In every one of the other forty-nine states and the District of Columbia, a toxic tort claim is deemed to accrue only after an injury has manifested itself.[1]

The Proceedings Below: Mr. Cline filed this case on April 6, 2001, less than two years after his diagnosis with leukemia but more than twelve years after his last

[1] For a complete listing of authorities establishing the accrual rule in other jurisdictions, *see* App. 112-27.

exposure to the benzene manufactured by respondents. App. 2. On January 8, 2004, respondents moved for summary judgment on the ground that his claim was barred under the rule of *Garrett*. On January 12, 2005, the trial court heard argument on respondents' renewed motion for summary judgment. At the hearing, Mr. Cline's counsel told the trial court judge that a new law review article about the statute of limitations issue had been written, but not yet published, and he asked the court to entertain an *amicus curiae* brief by the author of that article. The trial court judge consented.

On February 4, 2005, the *Amicus Curiae Brief of Environmental Litigation Group, P.C. in Response to Defendants' Motion For Summary Judgment* was filed with the trial court. *See* App. 56-59. The *amicus* brief alerted the trial court to the fact that Alabama's court-created exposure accrual rule denied due process of law under both the Alabama and United States Constitutions (App. 65-67), and the brief included as an attachment an unpublished draft of a law review article that was subsequently published. *See* Robert Leslie Palmer, *Withholding Justice From Toxic Tort Victims*, 28 AM. J. TRIAL ADVOCACY 567 (2005). That article also discusses at length how Alabama's court-created exposure limitations accrual rule denies due process of law.

On March 8, 2005, the trial court granted respondents' renewed motion for summary judgment, stating that Mr. Cline's claims expired in 1989, "within two years of his last exposures to their products," even though Mr. Cline was not diagnosed with leukemia for another ten years. App. 55.

On April 15, 2005, Mr. Cline timely filed a notice of appeal to the Supreme Court of Alabama, and he thereafter

filed a brief in which he argued, *inter alia*, that the trial court's order granting summary judgment denied Mr. Cline due process of law in violation of the Constitutions of the United States of America and the State of Alabama. App. 71-78 (excerpts from *Brief of the Appellant*, July 21, 2005, at 46-55). In response, respondents argued that Mr. Cline was not denied due process of law because he could have filed a lawsuit in 1987, twelve years before he was ever diagnosed with leukemia, an assertion that simply ignores the effect of *Hinton*, *Thomas*, and similar decisions. App. 84-85 (excerpts from *Brief of Appellees*, August 9, 2005, at 42-44).

On October 14, 2005, without opinion and without notice to the parties, the Supreme Court of Alabama affirmed the summary judgment. App. 51. Just two days after accidentally learning that the summary judgment had been affirmed, Mr. Cline filed an application for rehearing, together with a brief once again arguing that the summary judgment had denied him due process of law under both the United States and Alabama Constitutions. App. 96-99 (excerpts from *Brief of the Appellant on Rehearing*, November 11, 2005, at 9-14). On November 14, 2005, the Alabama Supreme Court granted the motion to permit the application for rehearing, and respondents thereafter filed a brief once again arguing that the summary judgment did not deny Mr. Cline due process of law. *See Appellees' Brief in Opposition to Application for Rehearing*, *Cline v. Ashland, Inc., et al.*, No. 1041076 (November 22, 2005) at 4.

Despite having denied oral argument on the initial hearing, on February 13, 2006, the Alabama Supreme Court scheduled the case for oral argument on April 4, 2006 in a special session. On April 11, 2006, exactly one week after the oral argument in the case, the court requested *amicus*

curiae briefs from the Alabama Trial Lawyers Association and the Business Council of Alabama. App. 107.

On May 11, 2006, the Alabama Trial Lawyers Association filed its *amicus* brief, and on June 12, 2006, the Business Council of Alabama filed its *amicus* brief. Among other things, the Business Council argued that Mr. Cline could have filed a lawsuit within two years of his last exposure and that he was therefore not denied a remedy. *See Brief of the Appellant in Reply to Brief of Amicus Curiae Business Council of Alabama, Cline v. Ashland, Inc., et al.,* No. 1041076 (July 7, 2006) at 7-9. In reply, Mr. Cline again asserted that the court-created exposure limitations accrual rule, when coupled with the manifest, present injury action accrual rule, denied Mr. Cline due process of law. *See Brief of Amicus Curiae, Business Council of Alabama, Filed at Invitation of Court, Cline v. Ashland, Inc., et al.,* No. 1041076 (June 12, 2006) at 27-30.

On January 5, 2007, the Alabama Supreme Court once again affirmed the summary judgment without opinion. App. 1. All nine justices, however, participated in one of three opinions, consisting of two "special concurrences" and one dissenting opinion. Although the issue was fully briefed by the parties, none of these opinions mentions the Due Process Clause of the United States Constitution, although two of them discuss Alabama's Due Process Clause. One special concurrence, authored by Justice See, reduces Alabama's Due Process Clause to a mere competing "policy" concern. App. 5. Four dissenting justices, however, recognized the Kafkaesque nature of the majority's decision:

> As things now stand, and as left in place by the majority in this case, the law in this State would seem to be this: A person exposed to a toxic substance having the potential to cause disease on

> a delayed basis, but who has suffered no manifest, present injury within two years thereafter, may not file an action within that two-year period [citing, *inter alia, Hinton*]. If, after two years, that same person in fact suffers an injury from the exposure and files an action, the action will be dismissed on the basis that it should have been filed earlier. Thus, no matter when the person intends to file the action, it is either too soon or too late.

App. 36-37. The law in Alabama is "confounded," said the dissent, and continued "blind obedience" to prior precedent "does not serve the law, but rather greatly disserves it." App. 38.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH NUMEROUS LONG-STANDING DECISIONS OF THIS COURT.

The decision below warrants review because it squarely conflicts with more than a century of this Court's precedents requiring civil litigants to be afforded a reasonable amount of time in which to commence a lawsuit. It is well established that the Due Process Clause of the Fourteenth Amendment protects a "cause of action [as] a species of property," *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)), and requires state courts to provide injured parties with a meaningful opportunity to have their claims adjudicated. *See id.* at 437. As applied to statutes of limitation in particular, this Court has made clear that limitations periods that extinguish claims before the litigant has had a reasonable amount of time to seek

judicial recourse are repugnant to the U.S. Constitution. *See, e.g., Terry v. Anderson,* 95 U.S. 628, 632 (1877) ("statutes of limitation affecting existing rights are not unconstitutional, *if a reasonable time is given* for the commencement of an action before the bar takes effect.") (emphasis added). By disregarding this long-standing hallmark of due process and holding that toxic tort victims need not be afforded *any* opportunity to commence a cause of action for their injuries, the court below adopted a position antithetical to constitutional principles reiterated by this Court since the 1800s. Review is warranted for this reason alone.

The issue of due process as it applies to statutory limitations periods most often arises in the context of challenges to the applicability of newly-enacted statutes of limitation to claims that have already accrued. In these cases, this Court has taken pains to make clear that statutes of limitation will pass constitutional muster only if they provide a *reasonable time* to commence a cause of action before the statutory bar takes effect.[2] Although the

[2] *See, e.g., Texaco, Inc. v. Short,* 454 U.S. 516, 518-19 (1982) (finding no due process violation because statute that required an end to mineral interests provided a two-year grace period in which owners could take appropriate action to protect their mineral interests); *Wilson v. Iseminger,* 185 U.S. 55, 64 (1902) (holding that provision of statute extinguishing charges upon real estate did not violate due process because it did not go into effect until three years after passage of statute, affording litigants "ample time" to make a claim); *Turner v. New York,* 168 U.S. 90, 94 (1897) (holding that statute extinguishing rights to land did not offend Constitution because it provided six-month grace period for the filing of claims to land); *McGahey v. Virginia (In re Brown),* 135 U.S. 662, 707-08 (1890) (holding unconstitutional a statute that limited the time to present state-issued coupons in the payment of demands due to the state to one year because of the unlikelihood that holders of the coupons would be able to use them in the time allotted); *Wheeler v. Jackson,* 137 U.S. 245, 256 (1890) (finding constitutional a statute providing six months in which to bring an action to compel the

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time afforded in most of these cases was held to be reasonable, this Court in each case expressly noted that, had the statute failed to provide a reasonable amount of time before extinguishing the plaintiff's claims, the statute would be repugnant to the Constitution. *See Texaco*, 454 U.S. at 527 n.21 ("It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action. . . .") (quoting *Wilson*, 185 U.S. at 62); *Wilson*, 185 U.S. at 62 (statute would have been "an unlawful attempt to extinguish rights arbitrarily" had it not afforded parties a "full opportunity" to bring a cause of action in court); *Turner*, 168 U.S. at 94 (statutes that "take away any right of action" would be unconstitutional, but those that "merely limit[] the time within which" to assert a legal claim would not); *In re Brown*, 135 U.S. at 707 ("[T]he time given for the act to be done must be a reasonable time; otherwise it would be unconstitutional and void."); *Wheeler*, 137 U.S. at 256 (statute of limitations should not be disturbed "unless the time allowed to bring suits upon existing causes of action is, in view of all the circumstances, so short as not to give parties affected by it a reasonable opportunity to protect their rights under the new law"); *Vance*, 108 U.S. at 517 (statute that "declared the abolition and extinction *eo instanti* of all tacit mortgages" would violate due process); *Terry*, 95 U.S. at 632-33

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execution of certain conveyances or leases passed constitutional muster because it afforded parties a "reasonable opportunity to protect their rights under the new law"); *Vance v. Vance*, 108 U.S. 514, 517 (1883) (holding as constitutionally sound a statute requiring tacit mortgages to be recorded by a certain date in order to be enforceable against third parties, because statute provided one year and eight months in which to record the mortgage); *Terry*, 95 U.S. at 634 (holding that nine months and seventeen days after passage of statute was reasonable amount of time to enable litigants to commence a lawsuit).

(a "reasonable time" must be afforded to litigants to commence a cause of action before the statutory limitations period expires); *see also Block v. North Dakota ex rel. Bd. of Univ. and Sch. Lands*, 461 U.S. 273, 286 n.23 (1983) (statute "arguably was unconstitutional to the extent it extinguished claims that could have been brought at the time of its passage"). Thus, contrary to the finding by the court below, this Court has repeatedly held that a statute of limitations cannot withstand constitutional scrutiny where it completely obliterates a litigant's right to seek judicial recourse.

This Court has reached the same conclusion in the context of cases involving statutory amendments that shorten a preexisting limitations period. In cases dating back to the 1800s, this Court has held that a limitations period may be amended to materially reduce the time in which a cause of action may be commenced, *but may not extinguish the opportunity to seek redress altogether. See, e.g., Ochoa v. Hernandez Y Morales*, 230 U.S. 139, 161-62 (1913) (holding that a statute of limitations "may be modified by shortening the time prescribed," but the U.S. Constitution requires that "this be done while the time is still running, and so that a reasonable time still remains for the commencement of an action before the bar takes effect"); *Kentucky Union Co. v. Kentucky*, 219 U.S. 140, 156 (1911) (finding that shortening of limitations period posed no constitutional problems when "an opportunity, not unreasonable in character, [wa]s given for compliance with the laws after the same [went] into effect . . . "); *Mitchell v. Clark*, 110 U.S. 633, 643 (1884) (holding that limitations period shortened to allow two years after statute's passage and two years after cause of action accrued to commence an action passed constitutional muster because it provided a "reasonable time . . . for the enforcement of the contract

by suit before the statute [barred] that right"); *Koshkonong v. Burton*, 104 U.S. 668, 675 (1881) (holding that amendment of statute to provide for different accrual date, and one-year grace period in which litigants could commence causes of action otherwise barred by the new accrual date, was constitutional because statute provided "a reasonable time, taking all the circumstances into consideration ... for the commencement of an action before the bar t[ook] effect"). Clearly, then, a statute that altogether denies a litigant the right to seek redress for his or her injuries does not pass constitutional muster.

Outside of the context of statutes of limitation, this Court has more generally held that a state's procedural requirements governing the manner in which a lawsuit may be commenced cannot deprive individual litigants of access to the judicial system. *See, e.g., Windsor v. McVeigh*, 93 U.S. 274, 278 (1876) ("The period within which the appearance must be made and the right to be heard exercised is, of course, a matter of regulation. . . . But the denial of the right to appear and be heard at all is a different matter altogether."). Thus, this Court has held that due process requires state court procedural requirements, including statutes of limitation, to afford litigants "an *opportunity* . . . granted at a meaningful time and in a meaningful manner . . . for [a] hearing appropriate to the nature of the case." *Logan*, 455 U.S. at 437 (emphasis in original) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Mullane*, 339 U.S. at 313).[3]

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[3] *See also Richards v. Jefferson County, Alabama*, 517 U.S. 793, 803 (1996) ("the State may not deprive individual litigants of their own day in court"); *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972) (prejudgment replevin provisions violated due process "insofar as they den[ied] the

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Applying these principles in *Logan v. Zimmerman Brush Company*, this Court found a violation of due process when the petitioner was denied an opportunity to have his allegations of discrimination adjudicated pursuant to the Illinois Fair Employment Practices Act. 455 U.S. at 424. The Act required complainants to first bring any charge of unlawful conduct before the Illinois Fair Employment Practices Commission ("Commission"), and provided that no further action could be taken on the charge until the Commission convened a fact-finding conference within 120 days. *Id.* at 424-25. In that particular case, the Commission failed to act in the time prescribed, an error which the Supreme Court of Illinois found to have extinguished the claimant's action. *Id.* at 427. This Court reversed, finding that a statutory limitations period will simply not pass constitutional muster if it extinguishes the rights of a litigant to be heard for reasons beyond the litigant's control. *Id.* at 434.[4]

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right to a prior opportunity to be heard" before individual was deprived of protected property interest); *Boddie v. Connecticut*, 401 U.S. 371, 390 (1971) (state's requirement that a fee be paid upon filing an action in court violated due process as applied to indigent claimants, "because it operate[d] to foreclose a particular party's opportunity to be heard"); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 681-82 (1930) (state court's decision denying an individual taxpayer any practicable opportunity to contest a tax on federal constitutional grounds violated due process, because "a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it").

[4] In keeping with this principle, this Court has also, on several occasions, interpreted statutes of limitation so as to avoid denying litigants a reasonable opportunity to commence an action in court. For example, in *Urie v. Thompson*, 337 U.S. 163, 169 (1949), the petitioner sought to bring a cause of action under the Federal Employers' Liability Act ("FELA") after he developed silicosis after years of exposure to silica

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In short, the decision below, which sanctions a legal regime that deprives tort victims of *any* opportunity to seek redress for their injuries, is in direct conflict with a substantial body of Supreme Court case law to the contrary. Review is warranted to resolve this conflict and remedy the widespread denial of due process hindering the rights of Alabama toxic tort victims.

II. THE DECISION BELOW ALSO CONFLICTS WITH NUMEROUS CONTRARY DECISIONS OF OTHER STATE COURTS OF LAST RESORT.

Review is also warranted because the decision below also conflicts with numerous state high court decisions holding that the Due Process Clause of the U.S. Constitution requires litigants to be afforded a reasonable opportunity to commence a cause of action. In case after case, state courts have held that a statute of limitations that does not provide

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dust. FELA contained a three-year statute of limitations, which the respondent urged accrued at the moment an individual contracted silicosis. *Id.* This Court rejected the respondent's reading of this statute, noting that had the petitioner been required to commence an action prior to any manifestation of his disability, "it would be clear that [FELA] afforded [him] only a delusive remedy." *Id.* This Court went on to find that the petitioner had three years from the time "when the accumulated effects of the deleterious substances manifest[ed] themselves" in which to file a claim. *Id.* at 170 (quoting *Associated Indemnity Corp. v. Industrial Accident Comm'n*, 124 Cal. App. 378, 381 (Cal. Dist. Ct. App. 1932)); *see also United States Fid. & Guar. Co. v. United States for the Use and Benefit of Struthers Wells Co.*, 209 U.S. 306, 316 (1908) (statute of limitations will not be construed so as to "tak[e] away absolutely a present right to sue until a period of time, measured possibly by years, shall have elapsed") (internal citation omitted); *Sohn v. Waterson*, 84 U.S. 596, 599 (1873) (retroactive application of statute would violate the Constitution, because "if an action accrued more than the limited time before the statute was passed, a literal interpretation of the statute would have the effect of absolutely barring such action at once").

a reasonable time in which to commence a cause of action violates federal due process. For example, the Supreme Court of New Mexico found a violation of federal due process under a set of facts strikingly similar to those presented here. *See Garcia v. LaFarge*, 893 P.2d 428, 430 (N.M. 1995). *Garcia* involved the constitutionality of New Mexico's Medical Malpractice Act, which contained a statute of limitations that barred claims for malpractice brought over three years after the act of malpractice, regardless of a patient's inability to discover the malpractice until an injury manifested itself. *Id.* at 432. The plaintiff in *Garcia* had been misdiagnosed by his doctors, but was not aware of the malpractice until he went into cardiac arrest and suffered irreversible brain damage nearly three years later. *Id.* at 430. Although his guardians filed suit shortly thereafter, the lower court granted summary judgment in favor of the defendant because the three-year limitations period had expired. *Id.* The Supreme Court of New Mexico reversed and, in doing so, "reaffirm[ed] the principle that considerations of fairness implicit in the Due Process Clauses of the United States and New Mexico Constitutions dictate that when the legislature enacts a limitations period it must allow a reasonable time within which existing or accruing causes of action may be brought." *Id.* at 437. The decision below irreconcilably conflicts with *Garcia* and countless other state high-court decisions insofar as it adopted a position that gives toxic tort victims *no* period of time – reasonable or otherwise – in which to seek redress for their injuries.[5]

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[5] *See also Harris v. Omaha Hous. Auth.*, 698 N.W.2d 58, 64 (Neb. 2005) (upholding statute that provided over one year for plaintiff to assert claims, but noting that "the Legislature may not deprive a plaintiff of an already accrued cause of action without providing the plaintiff a reasonable time in which to file the action"); *Kaprow v. Bd. of*

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The decision below also conflicts with numerous state high court decisions involving amendments to preexisting statutes of limitation that shortened the time for filing suit. Many courts have held that federal due process forbids the reduction of a statutory limitations period when doing so prevents litigants from commencing a cause of action within a reasonable time after the amendment takes effect. For example, in *Brothers v. Florence*, 739 N.E.2d 733, 740-41

Educ. of Berkeley Twp., 622 A.2d 237, 242 (N.J. 1993) (upholding 90-day limitations period because it provided litigant with "an opportunity, granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case") (internal citations omitted); *Dove v. Delgado*, 808 P.2d 1270, 1273 (Colo. 1991) (finding a two-year limitations period did not violate federal due process because it was not "manifestly so limited as to amount to a denial of justice") (quoting *Oberst v. Mays*, 365 P.2d 902, 905 (Colo. 1961)); *Black v. Ball Janitorial Serv., Inc.*, 730 P.2d 510, 513-14 (Okla. 1986) (holding that thirteen months in which to file suit was "a *reasonable* interval of time [that did] not offend the concept of due process") (emphasis in original); *Hansen v. A.H. Robins, Inc.*, 335 N.W.2d 578, 582 (Wis. 1983) (adopting discovery rule for tort actions, because "[i]t is manifestly unjust for the statute of limitations to begin to run before a claimant could reasonably become aware of the injury"); *Calder v. City of Crystal*, 318 N.W.2d 838, 844 (Minn. 1982) (holding that statute requiring joinder of third parties to a cause of action to occur within a period of fourteen months was a reasonable restriction and did not violate federal due process); *Owens v. Brochner*, 474 P.2d 603, 605 (Colo. 1970) (applying discovery rule in professional negligence cases, because to hold otherwise "makes a mockery of the law") (quoting *Berry v. Branner*, 421 P.2d 996, 998 (Or. 1966)); *Wichelman v. Messner*, 83 N.W.2d 800, 817-18 (Minn. 1957) (holding that nine months in which one may preserve an interest in property before the interest would be extinguished was reasonable); *Helterline v. People*, 66 N.E.2d 345, 348 (N.Y. 1946) (holding that a statute of limitations that precluded "any opportunity to bring a suit" violated due process); *State ex rel. White v. Dickerson*, 113 P. 105, 110 (Nev. 1910) (noting the rule "in the Supreme Court of the United States, and everywhere . . . that a litigant or claimant cannot be deprived entirely of his right to bring an action by an act of the state or Legislature, as this would amount to a denial of justice").

(N.Y. 2000), the New York Court of Appeals held that litigants were entitled to a minimum one-year grace period in which to commence a cause of action under a newly-enacted statute that reduced a preexisting limitations period by three years. *Id.* at 741. The court ruled that to hold otherwise would have left litigants with an "unreasonably brief" time in which to bring suit, *id.*, or in some cases no time at all, which would have violated federal due process. *Id.* at 738.

Likewise, in *Flippin v. Jarrell*, 270 S.E.2d 482, 487 (N.C. 1980), the Supreme Court of North Carolina found that a reduction in a statutory limitations period that left the plaintiff with only thirty-nine days in which to file a medical malpractice claim after a misdiagnosed condition manifested itself violated federal due process. In so finding, the Court noted that no "North Carolina case . . . has approved a grace period shorter than five months" in which to bring a cause of action before a statute of limitations extinguished that right. *Id.* at 487. *See also id.* n.8 (listing cases finding grace periods unreasonably short, and therefore unconstitutional); *Blevins v. Northwest Carolina Util.*, 184 S.E. 517, 520 (N.C. 1936) (holding that an amendment reducing the period of time in which a plaintiff could bring an action for damages to land against the state's electric company from twenty years to six months violated federal due process). Thus, for almost a century, state high courts have affirmed the very principle the court below rejected: statutes of limitation violate federal due process when they fail to provide a reasonable time in which to seek judicial redress.[6]

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[6] *See also Kratchovil v. Motor Club Ins. Ass'n*, 588 N.W.2d 565, 573-74 (Neb. 1999) (upholding limitations period, but affirming the principle that federal due process forbids the shortening of a limitations

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The decision below also runs contrary to a host of state high court cases involving the constitutionality of *retroactive* applications of statutes of limitation. Here again, court after court has held that a statute of limitations violates federal due process unless it affords litigants a reasonable time in which to commence a cause of action after the statute takes effect. *See, e.g., Lott v. Haley*, 370 So.2d 521, 524 (La. 1979) (holding that the limitations period in a medical malpractice case violated federal due process because it applied retroactively to immediately bar the plaintiff's claims); *Bell v. Union & Planters' Bank & Trust Co.*, 130 So. 486, 487 (Miss. 1930) (declining, on federal due process grounds, to apply a statute of limitations retroactively because "the statute contain[ed] no savings clause by which appellee was given time within which to preserve its claim from the bar of the statute").[7]

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period when doing so deprives litigants of a reasonable time to commence a cause of action after the amendment takes effect); *Phipps v. Sutherland*, 111 S.E.2d 422, 426 (Va. 1959) (same); *Tr. of Sch. of Twp. No. 1 v. Batdorf*, 130 N.E.2d 111, 115 (Ill. 1955) (same); *Scheas v. Robertson*, 238 P.2d 982, 986-87 (Cal. 1951) (same); *Baccus v. Banks*, 192 P.2d 683, 689 (Okla. 1948) (same); *In re Reed's Estate*, 142 P.2d 824, 828 (Kan. 1943) (same); *Tipton v. Smythe*, 94 S.W. 678, 680 (Ark. 1906) (same).

[7] *See also Univ. of Utah Hosp. v. Pence*, 657 P.2d 469, 471 (Idaho 1983) (statute requiring application for medical indigency benefits to be made within forty-five days after admission to hospital did not apply retroactively; to hold otherwise "would unfairly penalize the appellant for failure to comply with a statute of which it had no notice"); *Allen v. Dovell*, 66 A.2d 795, 797 (Md. 1949) (applying reasonableness standard to uphold retroactive application of statute of limitations); *Rand v. Bossen*, 162 P.2d 457, 459-60 (Cal. 1945) (same); *Berg v. Berg*, 264 N.W. 821, 823-25 (Iowa 1936) (same); *Philadelphia, Baltimore & Washington R.R. Co. v. Quaker City Flour Mills Co.*, 127 A. 845, 847 (Pa. 1925) (declining to apply statute of limitations retroactively when doing so would extinguish a plaintiff's claims in violation of federal due process); *McNamara v. Marx*, 66 So. 764, 765 (La. 1914) (statute

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In direct conflict with all of these holdings, the Alabama Supreme Court interpreted its statute of limitations so as to afford *no opportunity whatsoever* for victims of torts whose injuries do not manifest within two years of exposure to commence a cause of action. Review is warranted to resolve this conflict between the Alabama Supreme Court and numerous other state courts of last resort.[8]

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providing six-month grace period in which to institute a cause of action otherwise barred by retroactive application of limitations period did not deprive litigants of property without due process of law); *Adams & Freese Co. v. Kenoyer*, 116 N.W. 98, 100 (N.D. 1908) (holding that the retroactive application of a statute that left three months and twenty-one days in which to initiate foreclosure proceedings on mortgages violated federal due process because "it would be almost an utter impossibility" to initiate proceedings within that period of time); *Fitzgerald v. Scovil Mfg. Co.*, 60 A. 132, 133 (Conn. 1905) (finding that a statute of limitations applied retroactively was reasonable because it provided over six months to bring a cause of action).

[8] Although a number of state high courts have upheld statutes of limitation that deprived the litigant of any right to commence a cause of action before an injury manifested itself, state legislatures in the wake of these decisions have responded by amending the statutes of limitation to incorporate a discovery rule. *See, e.g., Bunker v. Nat'l Gypsum Co.*, 441 N.E.2d 8, 13-14 (Ind. 1982) (upholding as constitutional a statute of limitations that limited time to assert disability benefit claims based on exposure to asbestos to three years from exposure, regardless of whether the asbestosis had manifested itself), *superseded by statute*, 1998 Ind. Legis. Serv. 1-1998 (codified as amended at IND. CODE § 34-20-3-2(b) (1998)); *Owen v. Wilson*, 537 S.W.2d 543, 545 (Ark. 1976) (holding that statute of limitations which barred medical malpractice claims after two years of the wrongful act complained of, regardless of the plaintiff's ability to discover an injury until after that time, did not violate federal due process), *superseded by statute*, 1979 Ark. Acts 709, § 4 (codified as amended at ARK. CODE ANN. § 16-114-203 (1979)); *Laughlin v. Forgrave*, 432 S.W.2d 308, 315 (Mo. 1968) (same), *superseded by statute* (codified as amended at MO. ANN. STAT. § 516.100 (West 2002)).

III. THE DECISION BELOW ALSO CONFLICTS WITH NUMEROUS DECISIONS OF FEDERAL COURTS OF APPEALS, WHICH ARE THEMSELVES SPLIT ON THE QUESTION PRESENTED IN THIS CASE.

Review is also warranted because the decision below also conflicts with the decisions of numerous U.S. Courts of Appeals – which are themselves divided on whether a statute of limitations may constitutionally eliminate a cause of action without affording litigants a reasonable time to bring suit. On one hand, contrary to the decision below, many U.S. Courts of Appeals have held a state may not constitutionally eliminate a cause of action without giving a litigant a reasonable amount of time to file suit. *See, e.g., Fink v. Shelder*, 192 F.3d 911, 915-16 (9th Cir. 1999) (where the retroactive application of a statute of limitations still afforded the litigant three years in which to commence his cause of action, the statute passed constitutional muster because it provided a "reasonable time . . . to bring suit"); *Brackney v. Combustion Eng'g, Inc.*, 674 F.2d 812, 815 (9th Cir. 1982) (holding that a five-month period in which to commence a cause of action "provided a reasonable time 'for the commencement of suit before the bar takes effect,'" and therefore did not violate federal due process) (quoting *Wheeler*, 137 U.S. at 255); *D'Andrea v. Montgomery Ward & Co., Inc.*, 571 F.2d 403, 404 (7th Cir. 1978) (holding that two-year grace period in which to commence action after attaining age of majority could not be shortened by reducing age of majority from twenty-one to eighteen years, because, "although a legislature may shorten the period of limitations, it must afford potential plaintiffs affected by the statutory change a reasonable opportunity to file suit after the effective date of the

amendment") (citing *Terry*, 95 U.S. at 633); *Lamb v. Powder River Live Stock Co.*, 132 F. 434, 442-43 (8th Cir. 1904) (applying reasonableness standard to strike down as unconstitutional a statute of limitations that provided only three months in which to commence a cause of action based upon a judgment or decree rendered outside the state, noting that a statute which fails to provide a reasonable time in which to commence a cause of action is "an unlawful attempt to extinguish rights arbitrarily") (quoting *Wilson*, 185 U.S. at 62).[9]

On the other hand, despite the clarity of this Court's repeated holdings that a statutory limitations period must be reasonable to withstand federal due process scrutiny (*supra* at Point I), several Courts of Appeals have upheld state statutes of limitation that afforded litigants no time

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[9] A number of cases have likewise affirmed the principle that a limitations period must afford litigants a reasonable time to commence a cause of action in the course of determining Congressional or state legislative intent with respect to statutes of limitation. *See, e.g., Ockerman v. May Zima & Co.*, 27 F.3d 1151, 1157 (6th Cir. 1994) (holding that "Congress is without authority to extinguish claims by shortening the statute of limitations unless the prior limitations period has not yet expired and Congress provides a reasonable time in which the plaintiff may file suit"); *Williams v. Borden, Inc.*, 637 F.2d 731, 735 (10th Cir. 1981) (finding that the Oklahoma legislature intended that limitations period for personal injury action should not begin to run until the plaintiff knows, or with reasonable prudence should know, that a serious or permanent condition has been induced by defendant's product); *Capitan Grande Band of Mission Indians v. Helix Irrigation Dist.*, 514 F.2d 465, 468-69 (9th Cir. 1975) (finding that Congress intended federal statute of limitations, rather than shorter state statute of limitations, to govern claims where application of state statute would have eliminated plaintiff's right to sue on the ground that a contrary result "would be discordant with the Supreme Court's view that the constitutionality of statutes of limitations depend upon whether 'a reasonable time is given for the commencement of an action before the bar takes effect' ") (citing *Terry*, 95 U.S. at 632-33).

whatsoever in which to commence a cause of action. *See, e.g., Douglas v. Hugh A. Stallings, M.D., Inc.*, 870 F.2d 1242, 1249-50 (7th Cir. 1989) (upholding as constitutional a statute of limitations in a medical malpractice case that limited the time in which to commence action to two years from the act of malpractice, regardless of the patient's ability to discover the malpractice during that time); *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 554-55 (3d Cir. 1985) (holding that one-year wrongful death and two-year survival limitations periods passed constitutional muster, despite the fact that plaintiffs could not have reasonably discovered cause of asbestos-related diseases within that time); *Braswell v. Flintkote Mines, Ltd.*, 723 F.2d 527, 530-31 (7th Cir. 1984) (finding no federal due process violation where statute limited the time in which to commence product liability actions to two years after last exposure to asbestos); *Jewson v. Mayo Clinic*, 691 F.2d 405, 411-12 (8th Cir. 1982) (holding that two-year limitations period for medical malpractice claims that began to run when the physician's treatment ceased did not violate federal due process, even though statute extinguished many claims before an injury manifested itself).[10]

[10] In each of these cases, with the exception of *Jewson*, the state legislature subsequently amended the statute at issue to incorporate a discovery rule, or the state high court adopted the discovery rule in its application of the statute. (The same is true with respect to all cases cited *infra* at n.11.) No such action has been taken in the wake of *Jewson*; thus, medical malpractice cases arising in Minnesota may be extinguished before a plaintiff's injury manifests itself. *Jewson*, 691 F.2d at 408 (citing MINN. STAT. § 541.07 (1980), *amended by* MINN. STAT. § 541.076 (1999)).

The source of this conflict appears to be confusion about this Court's Fourteenth Amendment jurisprudence. The courts that have upheld statutes of limitation barring a litigant's claim before it even accrued principally relied on this Court's holding in *Chase Securities Corporation v. Donaldson*, 325 U.S. 304 (1945). *Chase*, however, arose in the context of a case involving whether or not a *defendant* had a constitutional right to immunity from suit after a statutory limitations period had expired, and whether the limitations bar could be lifted so as to restore a plaintiff's right to commence a cause of action. 325 U.S. at 316. *Chase* did not address the reasonableness of the limitations period, nor did it address the *plaintiff's* due process rights.[11] Notably, the Courts of Appeals that cite *Chase* for

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[11] In addition to *Chase*, two federal Courts of Appeals have cited *United States v. Kubrick*, 444 U.S. 111, 117 (1979), for the proposition that statutes of limitation "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" (Citation omitted). *Kubrick*, however, was a case interpreting the proper accrual date for claims arising under the Federal Tort Claims Act. The holding in that case was that a plaintiff need only be aware that he has suffered an injury, and not necessarily that he has a legally cognizable claim, for his cause of action to accrue. *Id.* at 123-24. Additionally, a number of cases cited no U.S. Supreme Court case law whatsoever in determining that a statute that afforded litigants no time in which to commence a cause of action passed constitutional muster. *See, e.g., Dinh v. Rust Int'l Corp.*, 974 F.2d 500, 502 (4th Cir. 1992) (finding no violation of federal due process where statute limited actions for defective design, manufacture, and installation of improvement to real property to five years within furnishing the improvement, even though plaintiff was not injured during that time); *Clark v. Gulesian*, 429 F.2d 405, 406 (1st Cir. 1970) (holding that "[u]nfortunate as the present result may be for the plaintiff," statute of limitations that accrued at the time of the wrongful act can bar claim for medical malpractice before plaintiff was aware of injury); *Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir. 1952) (upholding statute limiting time in which to commence suits for

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support fail to mention – let alone discuss – the numerous decisions of this Court holding that unreasonably short state statutes of limitations violate federal due process.

By contrast, the Court of Appeals decisions that *do* scrutinize statutes of limitation to ensure that they afford litigants a reasonable time in which to bring suit all cite *Terry* and its progeny, instead of *Chase*, to guide their analyses. The federal split of authority is especially striking given the clarity of this Court's teachings on the matter. In any event, review is warranted to resolve the disagreement not only between the Alabama Supreme Court and numerous U.S. Courts of Appeals, but also to rectify the disarray *among* the federal Courts of Appeals regarding the constitutionality of statutes of limitation (or judicial interpretations thereof) that unreasonably restrict victims' rights to sue.

IV. THE DECISION BELOW PERPETUATES A MANIFEST INJUSTICE THAT THE ALABAMA SUPREME COURT AND THE ALABAMA LEGISLATURE HAVE PROVEN THEMSELVES UNWILLING TO ADDRESS.

Finally, review should be granted because the decision below perpetuates an injustice that both the Alabama Supreme Court and the Alabama Legislature have refused to address. As recounted in the opinion below, following the Alabama Supreme Court's decision in *Garrett*, 368 So.2d at 521, which held that the statute of limitations in a toxic tort

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personal injury caused by defective gun from one year of sale of gun as constitutional, even though injury occurred outside the limitations period).

case began to run when the plaintiff was last exposed to the toxic substance, the Alabama Legislature passed a new statute of limitations that mirrored the so-called "discovery rules" that are currently in place in every other state in this country. *See* App. 25. *See also* App. 112-27 (list of accrual rules in other jurisdictions). Under that new discovery rule, the statute of limitations would not have begun to run until the date the plaintiff discovered, or should have discovered, the injury (App. 25) – an entirely appropriate rule that, if it had been applied to petitioner's decedent here, would have afforded him a reasonable time in which to file suit. The entire post-*Garrett* statute was declared invalid, however, on the ground that a portion of the statute that included a rule of repose was unconstitutional. App. 25.[12]

Rather than simply reenact the discovery rule on a prospective basis, the Alabama Legislature, which had apparently undergone a political change of heart, abandoned any attempt to protect the rights of most toxic tort victims in the state of Alabama, and instead enacted a very narrow discovery rule that merely applies to victims of asbestos exposure. App. 25. Under that statute, which

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[12] *See Lankford v. Sullivan, Long & Hagerty*, 416 So.2d 996, 1004 (Ala. 1982) (holding that statute of repose that cut off tort victims' rights to sue ten years after a product's manufacture violated due process, thereby invalidating entire statute). In this case, by contrast, the very same Court upheld a regime that bars toxic tort victims' rights to sue for their injuries *at all*, without even bothering to address the due process implications of its ruling – or its obvious conflict with *Lankford*. Ironically, however, even *Lankford* – a progressive decision that sought to *advance* victims' rights in the state of Alabama – ultimately backfired because the discovery rule that was struck down along with the repose provision was never reenacted by the Legislature, leaving Alabama tort victims worse off than if *Lankford* had never been decided in the first place.

remains in effect to this day, only victims of asbestos exposure enjoy the benefit of a discovery rule; all remaining toxic tort victims, like petitioner's decedent here, must sue within two years of their exposure to a hazardous substance, even if they have not yet manifested any injury. App. 25-26. Their cases are then subject to dismissal on the ground that their causes of action have not yet accrued under the holding of *Hinton* and numerous other decisions of the Alabama Supreme Court, which require a "manifest, present injury" as a prerequisite to suit. App. 36-37.

There the situation stands in the State of Alabama. In recent years there have been several attempts to introduce bills into the Legislature to address this problem, but the Legislature has refused to act. *See* App. 4-5; App. 13; App. 25. Meanwhile, the Alabama Supreme Court ducked the issue in this case without even bothering to write a majority opinion. Curiously, however, each of the five justices who formed the silent majority joined one of two "special concurrences" that purported to explain the basis for the majority's decision. App. 2-15. The first concurrence candidly admitted that "[t]he public-policy question presented to this Court in this case is one of profound importance, not only to the parties involved, but to countless others as well." App. 7. Both the concurrences concluded, however, that the appropriate solution was for the *Legislature* to take action (*see* App. 7 and 14-15) – this despite the fact that the Legislature has repeatedly and steadfastly *refused* to take any action at all. Clearly, the buck is being passed in the State of Alabama, and the price is ultimately being paid by

victims like Jack Cline, who are being deprived of their right to seek any redress for their injuries.[13]

This is by no means a trivial problem. Alabama ranks fourth in the nation for the production of toxic wastes and thirteenth for total toxic releases. *See* Robert Leslie Palmer, *Withholding Justice from Toxic Tort Victims*, 28 AM. J. TRIAL ADVOCACY 567, 568 (2005) (citing 2001 Toxics Release Inventory, United States Environment Protection Agency, *available at* http://www.epa.gov/tri/tridata/tri01/state/Alabama.pdf). Alabama ranks tenth in the nation in the incidence of lung cancer and sixteenth in the incidence of all cancers. *Id.* (citations omitted). It is estimated that, by the end of 2004, approximately 24,270 Alabamians will have been diagnosed with cancer and 10,000 Alabamians will have died as a result of cancer. *Id.* (citations omitted). A substantial number of these cancer cases will be attributable to exposure to toxic substances, but, under the

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[13] Although the first special concurrence recognized the "appeal" to a discovery rule as applied to this case, App. 6, it concluded that creation of such a rule constituted a "policy change" that "falls squarely within the province and competence of the legislative branch of our government." App. 6. As the four dissenting justices recognized, however, this rationale is clearly erroneous, given that the decision in *Garrett* was itself a "court-made" rule, and thus could appropriately be reversed by a decision of the Alabama Supreme Court without affecting any of the statutory limitations periods enacted by the Alabama Legislature. *See* App. 27. Indeed, as the dissent rightfully observed, if anything, it is *Garrett* itself, which announced a bizarre accrual rule that is nowhere reflected in any of the statutory provisions governing toxic tort cases, that "represents judicial public policy-making of the type the majority in this case now rightfully decries." App. 20. As the dissent properly concluded, the problem created by *Garrett* can and should "be corrected now." App. 39. *See also* App. 47 ("[T]he Court, having created the *Garrett* rule, should assume the responsibility for overruling it and replacing it with a rule that conforms to established principles for determining when a court cause of action accrues.").

perverse rules adopted by the Alabama Supreme Court and enshrined by the decision below, many – if not most – of the victims will find themselves locked out of Alabama courts. Plainly, this will not do. The decision below should be reversed to prevent this manifest injustice and give Alabama citizens the right to seek redress for their injuries.

CONCLUSION

This petition for a writ of *certiorari* should be granted.

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2006-2007

1041076

Jack Cline

v.

Ashland, Inc., et al.

Appeal from Jefferson Circuit Court,
Bessemer Division
(CV-01-423)

On Application for Rehearing

(Filed Jan. 5, 2007)

SEE, Justice.

APPLICATION GRANTED; NO-OPINION AFFIRMANCE OF OCTOBER 4, 2005, WITHDRAWN; AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(F), Ala. R. App. P.

Nabers, C.J., and See, Stuart, Smith, and Bolin, JJ., concur specially.

Lyons, Harwood, Woodall, and Parker, JJ., dissent.

SEE, Justice (concurring specially).

Jack Cline appeals from the summary judgment entered by the Jefferson Circuit Court, which held that Cline's claims are barred by the statute of limitations. On October 14, 2005, this Court affirmed the summary judgment without an opinion. Cline applied for a rehearing. We granted his application and heard oral argument. This Court today affirms the summary judgment on rehearing, without an opinion, and I write specially to explain why I concur in its decision to do so.

Cline alleges that from 1968 to 1987, while he was working for Griffin Wheel Company of Bessemer, he was exposed to the chemical benzene. He retired from Griffin Wheel in 1995, and he was diagnosed with acute myelogenous leukemia ("AML") on October 7, 1999. On April 6, 2001, Cline sued Ashland, Inc.; Chevron Phillips Chemical L.P., the successor in interest to Chevron Chemical Company, LLC; and ExxonMobil Corporation, alleging that the defendants manufactured and/or supplied the benzene to which he was exposed during the course of his employment at Griffin Wheel. He alleges that the defendants are responsible for his developing AML and are liable under the Alabama Extended Manufacturer's Liability Doctrine ("the AEMLD"). The defendants moved for a summary judgment, arguing that Cline's claims are barred by the applicable statute of limitations. Cline argued that the statute of limitations did not begin to run until he was

diagnosed with AML. The trial court entered a summary judgment in favor of the defendants, holding that the applicable statute of limitations began to run in 1987, when Cline was last exposed to the benzene. Cline appealed the trial court's summary judgment as to his AEMLD claim, and this Court affirmed the summary judgment, without an opinion. Cline applied for a rehearing, which this Court granted.

In 1979, in *Garrett v. Raytheon Co.,* 368 So. 2d 516 (Ala. 1979), this Court considered the case in which Jerry Garrett sued several companies, claiming that he had unknowingly been exposed to massive amounts of radiation from 1955 to 1957 because, he argued, the companies had negligently designed certain radar systems where he worked. He did not experience any health problems as a result of the radiation exposure until March 1975, when his hair suddenly turned white and then fell out. He consulted several doctors but it was not until March 1977 that a radiologist told him that his earlier radiation exposure had caused his health problems. Although Garrett brought his action within 1 year of the radiologist's diagnosis, he did so more than a year after the first manifestation of his health problems and more than 20 years after his last exposure to the radiation. At the time this Court decided *Garrett,* the applicable statute of limitations required that "[a]ctions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section" be commenced within one year from accrual. § 6-2-39(a)(5), Ala. Code 1975.[1] In *Garrett,* this Court held that "the statute of

[1] This provision was recodified at § 6-2-38(*l*), Ala. Code 1975, after the limitations period was increased to two years in 1985.

limitations of one year began to run when [the] plaintiff was last exposed to radiation and the plaintiff's ignorance of the tort or injury, there being no fraudulent concealment, does not postpone the running of the statute until the tort or injury is discovered." 368 So. 2d at 521.

The *Garrett* Court invited the legislature to respond. The legislature responded by enacting Act No. 79-468, Ala. Acts 1979.[2] Act No. 79-468 provided a discovery rule for cases in which a person has been injured by a toxic substance over a period of time. § 6-5-502, Ala. Code 1975. Under the discovery rule, the statute of limitations did not begin to run until the date the plaintiff discovered, or should have discovered, the injury. § 6-5-502, Ala. Code 1975. The legislature, however, provided in Act No. 79-468 that if any part of the Act was declared unconstitutional, then the entire Act would become inoperative. § 6-5-504, Ala. Code 1975. In accordance with this limitation, this Court invalidated the entire Act when it held that a particular section of Act No. 79-468 concerning a rule of repose was unconstitutional. With Act No. 79-468 no longer in effect, the law reverted to the "last exposure" rule declared in *Garrett*. Since then, the legislature has acted in the toxic-tort area, but has limited the scope of the subsequent act to injuries resulting from exposure to asbestos. § 6-2-30(b), Ala. Code 1975. The Alabama Legislature also has considered, and thus far chosen not to

[2] Act No. 79-468 is codified at §§ 6-5-500 through -504, Ala. Code 1975.

adopt, proposals that would provide a discovery rule in cases of the nature of this one.[3]

This Court also has consistently chosen to continue to follow *Garrett*'s "last exposure" rule. See, e.g., *Moore v. Glover,* 501 So. 2d 1187, 1190 (Ala. 1986) ("[T]his Court's opinion in *Garrett v. Raytheon Co.,* 368 So. 2d 516 (Ala. 1979), settled the question of the 'accrual' of a plaintiff's claim in a radiation exposure case for purposes of determining when the applicable statute of limitations begins to run. . . ."); *Hubbard v. Liberty Mut. Ins. Co.,* 599 So. 2d 20, 21 n.2 (Ala. 1992) ("[I]t seems to be settled in Alabama that the 'date of injury,' which starts the running of the statutory period of limitations in a continuous exposure case, occurs when the plaintiff was last exposed to the chemical or condition causing his injuries.").

The legislature has acted in this area both by enacting legislation and by considering, and thus far not adopting, proposed legislation. See §§ 6-5-500 through -504, Ala. Code 1975, and citations in footnote 3. The power "to declare what the law shall be" is a legislative power, and this Court will not revisit an area of the law in which the legislature has already acted. *City of Daphne v. City of Spanish Fort,* 853 So. 2d 933, 942 (Ala. 2003).

The determination of when the statute of limitations ought to begin to run in toxic-substance-exposure cases depends on a weighing of competing public policies. We seek in Alabama to compensate those who have been injured. Ala. Const. 1901, Art. I, § 13 ("[T]hat every person,

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[3] See Senate Bill 534 and Senate Bill 535 (2006 Regular Session); House Bill 659 and House Bill 660 (2005 Regular Session); and House Bill 93 and House Bill 103 (2004 Regular Session).

for any injury done him . . . shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay."). On the other hand, we also seek to avoid stale claims and the injustice such claims can engender. *Travis v. Ziter,* 681 So. 2d 1348, 1355 (Ala. 1996) ("At its core, the statute of limitations advances the truth-seeking function of our justice system, promotes efficiency by giving plaintiffs an incentive to timely pursue claims, and promotes stability by protecting defendants from stale claims."). The proper balance between these competing public policies requires a weighing, and "[i]t is well established that '"[t]he Legislature is endowed with the exclusive domain to formulate public policy in Alabama. . . ."'"[4] *Leonard v. Terminix Int'l Co.,* 854 So. 2d 529, 534 (Ala. 2002) (citations omitted).

Justice Harwood states in his dissent that he would require that there be a manifest, physical injury before the statute of limitations begins to run in these toxic-substance-exposure cases. He would apply this interpretation prospectively only, as a forward-looking resolution of the problem. There is an appeal to the proposal; it looks very much like the statute enacted by the legislature in response to this Court's decision in *Garrett,* but without the repose provision that this Court held unconstitutional and that the legislature considered essential to the Act. The imposition of this sort of policy change, however, falls squarely within the power and competence of the legislative branch of our government. *Berdeaux v. City Nat'l*

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[4] "Within their respective spheres each branch of government is supreme. Judicial power and legislative power are coordinate, and neither can encroach upon the other." *Morgan County Comm'n v. Powell,* 292 Ala. 300, 306, 293 So. 2d 830, 834 (1974) (citations omitted).

Bank of Birmingham, 424 So. 2d 594, 595 (Ala. 1982) ("[W]e cannot agree that redress should come by rewriting the law of torts. . . . To be able to answer [the question presented by the appeal] would require data that a court is ill equipped to gather, but which the legislature is equally capable of assessing. The issue itself presents a policy matter peculiarly within the province of the legislative as opposed to the judicial branch of government. . . . [C]ourts . . . should leave to the executive and legislative branches matters requiring resolution in the body politic.").

The public-policy question presented to this Court in this case is one of profound importance, not only to the parties involved, but to countless others as well; however, this Court's jurisdiction and competence are not defined by the importance of the matter presented. See *Etowah County Comm'n v. Hayes,* 569 So. 2d 397, 398 (Ala. 1990) ("In testing the absolutism of the authority of the legislative branch to appropriate operational funds for the executive branch, the judicial branch of government is constrained not to substitute its judgment for that of the legislature and thus usurp the plenary power of that branch."). The legislature is entrusted with making the public policy of this State, whether or not it is public policy of which this Court would approve. *Boles v. Parris,* [Ms. 1030744, August 18, 2006] ___ So. 2d ___, ___ (Ala. 2006) ("[I]t is well established that the legislature, and not this Court, has the exclusive domain to formulate public policy in Alabama."); *Marsh v. Green,* 782 So. 2d 223, 231 (Ala. 2000) ("Matters of policy are for the Legislature and, whether wise or unwise, legislative policies are of no concern to the courts."). The legislature is empowered to investigate the full impact of a public-policy decision on not only the parties involved in a particular case, but on

the State as a whole; it is designed to offer the very kind of forward-looking resolution Justice Harwood proposes in the dissent. See *Holmes v. Circo,* 196 Neb. 496, 505, 244 N.W.2d 65, 70 (1976) ("The Legislature may hold hearings, debate the relevant policy considerations, weigh the testimony, and, in the event [it] determines a change in the law is necessary or desirable, it can then draft statutes which would most adequately meet the needs of the public in general, while balancing the interest of specific sectors."). I, therefore, defer to the legislature for a resolution of the problem presented by this case.

I would also note that the proposed prospective application of the interpretation of the law advocated by the dissent to only future litigants may exceed the power of this Court. This Court has stated that whether to apply an interpretation of the law retroactively or prospectively is a "matter of judicial discretion," *State v. Morrison Cafeterias Consol., Inc. of Delaware,* 487 So. 2d 898, 903 (Ala. 1985), but that this Court's "strong inclination is to avoid establishing rules that are to be applied prospectively only." *Alabama State Docks Terminal Ry. v. Lyles,* 797 So. 2d 432, 439 (Ala. 2001). We have stated that applying the law retroactively "'is in keeping with the traditional function of the courts to decide cases before them based on their current understanding of the law. . . . It also reflects the declaratory theory of law, . . . according to which the courts are understood only to find the law, not to make it.'" *McCullar v. Universal Underwriters Life Ins. Co.,* 687 So. 2d 156, 165 (Ala. 1996). "'Courts do not and cannot change the law by overruling or modifying former opinions. They only declare it by correcting an imperfect or erroneous view. The law itself remains the same.'" *G.P. v. A.A.K.,* 841 So. 2d 1252, 1255 n.1 (Ala. Civ. App. 2002)

(quoting *Crigler v. Shepler,* 79 Kan. 834, 842, 101 P. 619, 621 (1909)).

The Supreme Court of the United States has renounced the practice of prospective application of judicial decisions. See *Harper v. Virginia Dep't of Taxation,* 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."); *Reynoldsville Casket Co. v. Hyde,* 514 U.S. 749, 752 (1995) (following *Harper* and summarizing the decision as follows: "this Court, in *Harper v. Virginia Dept. of Taxation,* 509 U.S. 86, 97, . . . held that, when (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat that same (new) legal rule as 'retroactive,' applying it, for example, to all pending cases, whether or not those cases involve predecision events"). In his special concurrence in *Harper,* Justice Scalia explained that prospective application of judicial decisions violates the separation-of-powers doctrine. *Harper,* 509 U.S. at 107 (Scalia, J., concurring). ("Fully retroactive decisionmaking was considered a principal distinction between the judicial and the legislative power: '[I]t is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases.' T. Cooley, *Constitutional Limitations* *91 [(1868)].").

I agree with Justice Scalia and the Supreme Court of the United States that prospectivity is incompatible with the traditional conception of judicial power. Moreover, the Alabama Constitution unequivocally states that "the judicial [branch] shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men." Article III, § 43, Ala. Const. 1901. As I stated in *State ex rel. King v. Morton,* [Ms. 1051771, October 12, 2006] ___ So. 2d ___, ___ (Ala. 2006) (See, J., concurring specially): "Unlike the Constitution of the United States, from which we may deduce a general, but limited, separation-of-powers doctrine by its structure, the Constitution of Alabama provides expressly for a separation of powers that appears more rigorous than that of the federal constitution." (Footnote omitted.) Certainly, if the prospective application of a judicial decision is violative of the United States Constitution, it is also violative of the Alabama Constitution. As we stated in *City of Daphne v. City of Spanish Fort,* 853 So. 2d 933, 942 (Ala. 2003): "'"[T]o declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative."'" (quoting *Sanders v. Cabaniss,* 43 Ala. 173, 180 (1869), quoting in turn Thomas M. Cooley, *Constitutional Limitations* 91-95 (1868)).

For the foregoing reasons, I concur in affirming the summary judgment.

Nabers, C.J., and Stuart, J., concur.

SMITH, Justice (concurring specially).

I concur in affirming the judgment of the trial court. I write specially to emphasize, as this Court has in the past, that the legislature must act to determine the date of the accrual of the cause of action in toxic-substance-exposure cases.

Although the Justices in *Garrett v. Raytheon Co.*, 368 So. 2d 516 (Ala. 1979), were split as to the proper definition of "accrued," *both* the majority opinion and the dissenting Justices *called on the legislature* to enact legislation addressing that definition. *Garrett* thus placed the ball in the legislature's court.

The legislature responded by enacting Act No. 79-468, Ala. Acts 1979 (codified at Ala. Code 1975, §§ 6-5-500 through -504). Section 6-5-502 provided a discovery rule for actions seeking damages for injuries resulting from exposure to toxic substances. However, § 6-5-502(c), which contained a rule of repose, was declared unconstitutional in *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996 (Ala. 1982), as recognized in *Daniel v. Heil Co.*, 418 So. 2d 96 (Ala. 1982). Because § 6-5-504 provided that in the event any part of §§ 6-5-500 through -504 was declared invalid the entire act would become inoperable, *Garrett* remained the law. Soon thereafter, the legislature again acted to alter this Court's definition of "accrued" in toxic-substance-exposure cases by enacting Act No. 80-566, Ala. Acts 1980, but this time it limited the act strictly to claims alleging injury from asbestos. See Ala. Code 1975, § 6-2-30(b).[5]

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[5] Act No. 80-566 was also challenged as unconstitutional, and part of it was declared unconstitutional. See *Tyson v. Johns-Manville Sales Corp.*, 399 So. 2d 263 (Ala. 1981). However, unlike Act No. 79-468, it did

(Continued on following page)

The definition of "accrued" in toxic-substance-exposure cases other than asbestos cases *was left untouched,* and the legislature is presumed to have knowledge of this fact. *Mobile Infirmary Med. Ctr. v. Hodgen,* 884 So. 2d 801, 814 (Ala. 2003) ("The Legislature, when it enacts legislation, is presumed to have knowledge of existing law and of the judicial construction of existing statutes.").

This Court has continued to apply the holding of *Garrett* since 1979. See, e.g., *Ramey v. Guyton,* 394 So. 2d 2, 5 (Ala. 1980) (stating that "while rejecting the 'discovery of injury' rule, [*Garrett*] remained true to the common law 'accrual' principle"); *Tyson v. Johns-Manville Sales Corp.,* 399 So. 2d 263, 268 (Ala. 1981) (noting that, before the enactment of Act No. 80-566, *Garrett* held that a claim based on injury from exposure to asbestos accrued on the date of plaintiff's last exposure); *American Mut. Liab. Ins. Co. v. Phillips,* 491 So. 2d 904, 908 (Ala. 1986) (holding that "the longstanding damages rule followed in [*Garrett*]" was applicable in a case involving an injury sustained from exposure to cotton fibers); *Moore v. Glover,* 501 So. 2d 1187, 1190 (Ala. 1986) ("[T]his Court's opinion in [*Garrett*], settled the question of the 'accrual' of a plaintiff's claim in a radiation exposure case for purposes of determining when the applicable statute of limitations begins to run. . . ."); *Hillis v. Rentokil, Inc.,* 596 So. 2d 888, 890 (Ala. 1992) (applying the rule in *Garrett* that the statute of limitations begins to run from the "date of injury"); *Hubbard v. Liberty Mut. Ins. Co.,* 599 So. 2d 20, 21 n.2 (Ala. 1992) (citing *Garrett* for the proposition that "the 'date of

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not contain a clause nullifying the entire act if a portion were found to be invalid. Thus, the discovery rule provided by Act No. 80-566 in asbestos-exposure cases remains operable.

injury,' which starts the running of the statutory period of limitations in a continuous exposure case, occurs when the plaintiff was last exposed to the chemical or condition causing his injuries"); *Johnson v. Garlock, Inc.*, 682 So. 2d 25 (Ala. 1996) (applying the rule of *Garrett* in an asbestos-exposure case in which § 6-2-30(b) did not apply); and *Becton v. Rhone-Poulenc, Inc.*, 706 So. 2d 1134, 1135 (Ala. 1997) (citing *Garrett* for the proposition that "[f]or purposes of an action based on continuous exposure to a hazardous substance, the date of the injury is the day on which the plaintiff was last exposed to the hazardous substance causing the injuries"). See also *Payton v. Monsanto Co.*, 801 So. 2d 829 (Ala. 2001).

Proposals to adopt a discovery rule or to redefine when a cause of action accrues in toxic-substance-exposure cases have been introduced in the legislature, but those proposals have not been enacted. See Senate Bill 535 (2006 Regular Session) (expanding Ala. Code 1975, § 6-2-30(b), to provide that a civil action for any injury to the person resulting from exposure to "any toxic substance" shall be deemed to accrue on the first date the injured party, through reasonable diligence, should have reason to discover the injury); House Bill 660 (2005 Regular Session) (proposing a constitutional amendment to provide that a civil cause of action for exposure to toxic substances shall be deemed to accrue on the date the injured party should have reason to discover the injury giving rise to the cause of action); and House Bill 103 (2004 Regular Session) (providing that an action for breach of warranty or for injury caused by the "latent" effects of exposure to "substances" must be brought within two years from the date the injury is discovered or, by the exercise of reasonable diligence, should have been discovered).

On some level, all statutes of limitations can lead to harsh results. On the other hand, the absence of statutes of limitations, or statutes of limitations that allow the litigation of exceedingly old and stale cases, can also lead to harsh results. Given the various types of toxic substances and injuries that could result from exposure to such substances, the science involved in detecting and diagnosing injuries or the manifestation of injuries resulting from such exposure, and the public-policy considerations that must be taken into account, I believe the legislature is better equipped than is this Court to formulate a proper definition of "accrued" in these types of cases. The legislature has certain fact-finding and investigative capabilities that this Court lacks; it is thus in a better position to weigh the countervailing public-policy considerations inherent in properly determining "how long is too long." See *Leonard v. Terminix Int'l Co.*, 854 So. 2d 529, 534 (Ala. 2002) (holding that the legislature, and not this Court, has the exclusive domain to formulate public policy in Alabama); *Berdeaux v. City Nat'l Bank of Birmingham*, 424 So. 2d 594, 595 (Ala. 1982) (declining to create a duty requiring banks to provide protection for customers using automatic teller machines because to do so "would require data that a court is ill equipped to gather, but which the legislature is especially capable of assessing" and noting that "[t]he issue itself presents a policy matter peculiarly within the province of the legislative as opposed to the judicial branch of government"); and *Matthews v. Mountain Lodge Apartments, Inc.*, 388 So. 2d 935, 938 (Ala. 1980) (plurality opinion) (stating that the legislature – through hearings and other fact-finding procedures – is better equipped to accurately weigh various factors in creating law in accord with public policy).

Given the long history of *Garrett,* the difficulty in crafting a proper definition of "accrued" in toxic-substance-exposure cases, along with the public-policy considerations that must be taken into account in formulating such a definition, and the legislature's specific prior action in asbestos-exposure cases, I believe that the legislature is the more appropriate body to impose a new rule.

Bolin, J., concurs.

HARWOOD, Justice (dissenting).

In their special concurrences to this Court's decision to affirm the trial court's summary judgment in this appeal without an opinion, Justice See and Justice Smith emphasize that it is the role of the legislature, not this Court, to declare public policy. I quite agree. Indeed, the legislature has already acted and declared the public policy applicable to this case, by means of the interaction of two provisions of the Code of Alabama. Section 6-2-30(a), Ala. Code 1975, provides, in pertinent part, that "[a]ll civil actions must be commenced after the cause of action has accrued within the period prescribed . . . and not afterwards. . . ." Section 6-2-38(*l*), Ala. Code 1975, provides that an action of the type Jack Cline has filed "must be brought within two years." Therefore, the legislatively declared public policy is that an action such as Cline's can be filed (within the two-year limitations period) only after the cause of action has *accrued.* By this dissent, I do not presume to advocate a contrary public policy; I simply attempt to honor the public policy the legislature has declared, by correctly construing the statutory language "cause of action has accrued" in § 6-2-30(a) in accord with traditional principles of tort law.

Neither special concurrence takes the position that the construction given that language in *Garrett v. Raytheon Co.*, 368 So. 2d 516 (Ala. 1979), was in accord with those principles and true to the legislature's intent. They simply take the position, in support of which they offer reasoned argument, that any change from the rule set out in *Garrett* must, at this late date, be left exclusively to the legislature. For the reasons I set forth hereinafter, I respectively disagree.

First, however, these three miscellaneous points: Although Justice See fairly states the basic facts underlying Cline's tort claim, it is appropriate to note that it is undisputed that acute myelogenous leukemia can be caused by exposure to benzene, which this Court described in *Shell v. Union Oil Co.*, 489 So. 2d 569, 570 (Ala. 1986), as "a carcinogen known to cause leukemia." Also, Cline made the alternative argument before the trial court and on original submission on this appeal that his "last exposure" in 1999 to benzene contained in the product of an alleged "joint tortfeasor" of the present appellees should serve to delay the running of the statute of limitations as to them as well. Because this contention was not revisited in Cline's brief in support of his application for rehearing, it was thereby waived and will not now be considered. *Birmingham News Co. v. Horn*, 901 So. 2d 27, 77 (Ala. 2004). Last, the defendants have not attempted to argue that the natural history of acute myelogenous leukemia is such that Cline must have been suffering from it, i.e., that he must have actually experienced a manifest, present injury in connection with it, before his October 7, 1999, diagnosis. Accordingly, Cline's action filed on April 6, 2001, was timely under the two-year statute of limitations, if the commencement of the running of that statute is measured

from October 7, 1999, or any other time within two years before April 6, 2001.

Relevant Caselaw and Legislation

In *Garrett,* supra, Jerry Kenneth Garrett filed an action in 1978 against seven companies he alleged had designed, manufactured, or serviced certain radar systems with which he had had contact from 1955 to 1957; he asserted that because of the defective condition of those systems, he unknowingly had been exposed to massive dosages of dangerous radiation. He had experienced no symptoms or health problems until March 1975. He then consulted numerous doctors, but the nature of his problems was not diagnosed until March 1977 when a radiologist advised him that his problems were the result of his earlier radiation exposure. Garrett's action was filed within one year of that diagnosis, but more than one year after the first manifestation of his health problems and more than two decades after his last exposure to the radiation. Then, as now, § 6-2-30, Ala. Code 1975, required that all civil actions must be commenced within the statutorily prescribed limitations period "after the cause of action has *accrued*" (emphasis supplied). The then applicable statute of limitations, former § 6-2-39(a)(5), required "[a]ctions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section" to be commenced within one year from accrual. (That provision was recodified as § 6-2-38(*l*) when the limitations period was increased to two years in 1985.)

The opinion of the five-member *Garrett* majority (four Justices dissented) commenced: "When does the statute of limitations begin to run for injuries suffered as a result of

radiation exposure? We conclude that it begins to run when the plaintiff is exposed to radiation *and an injury occurs.*" 368 So. 2d at 517-18 (emphasis supplied). However, the majority then collapsed injury into exposure, holding that "the statute of limitations of one year began to run when plaintiff was last exposed to radiation and plaintiff's ignorance of the tort or injury, there being no fraudulent concealment, does not postpone the running of the statute until the tort or injury is discovered." The Court justified this conclusion by stating, "[i]f plaintiff was *not injured* in 1955-1957 then defendant committed *no negligent act* at that time which *resulted* in *injury* and defendant would not be liable. If plaintiff did become *injured* or *damaged* at that time, then the statute of limitations has run." 368 So. 2d at 521. The Court similarly reasoned, "*[d]amage* must have occurred at the time of exposure else defendant would not be liable. It is simply that all the progressive nature of the injury has not made itself manifest at the time of the last exposure." 368 So. 2d at 520. As Justice Shores observed in her dissent, "[t]he majority opinion assumes that the injury occurred simultaneously with the plaintiff's exposure to the radiation." 368 So. 2d at 526. She disagreed, stating that "[t]he defendant's exposure of the plaintiff to radiation would not create a cause of action in the plaintiff until injury resulted from that exposure." 368 So. 2d at 526. Justice Jones in his dissenting opinion on application for rehearing likewise explained that the holding of the majority "reduces date of injury (and thus accrual of the cause of action) to a legal conclusion without regard to when the injury in fact occurs." 386 So. 2d at 528.

Leading up to its conclusion that "[t]he injury in this case occurred on the date or dates of exposure," 368 So. 2d at 520, the majority acknowledged that

> "there are cases where the act complained of does not itself constitute a legal injury at the time, but plaintiff's injury only comes as a result of, and in furtherance and subsequent development of, the act defendant has done. In such cases, the cause of action accrues, and the statute of limitation begins to run, 'when, and only when, the damages are sustained.'"

368 So. 2d at 519. The countervailing rule was explained by the Court as follows:

> "'"If the act of which the injury is the natural sequence is of itself a legal injury to plaintiff, a completed wrong, the cause of action accrues and the statute begins to run from the time the act is committed, be the actual damage (then apparent) however slight, and the statute will operate to bar a recovery not only for the present damages but for damages developing subsequently and not actionable at the time of the wrong done; for in such a case the subsequent increase in the damages resulting gives no new cause of action."'"

368 So. 2d at 519 (quoting *Home Ins. Co. v. Stuart-McCorkle,* 291 Ala. 601, 608, 285 So. 2d 468, 473 (1973), quoting in turn *Kelley v. Shropshire,* 199 Ala. 602, 604-05, 15 So. 291, 292 (1917)).

The majority's explanation that Garrett's radiation exposure fell within the second class of cases because the "defendant committed no negligent act at that time which resulted in injury and defendant would not be liable," 368

So. 2d at 521, and "[d]amage must have occurred at the time of exposure else defendant would not be liable," 368 So. 2d at 520, seems to me to be no more than circular reasoning that ignores the first class of cases. Indeed, to my best attempt to follow the reasoning of the *Garrett* majority, it represents judicial public policy-making of the type the majority in this case now rightfully decries.

In selecting "last exposure" as the accrual date, the *Garrett* Court relied upon three of its prior decisions and a federal case: *Howell v. City of Dothan,* 234 Ala. 158, 174 So. 624 (1937); *American Mut. Liab. Ins. Co. v. Agricola Furnace Co.,* 236 Ala. 535, 183 So. 677 (1938); *Garren v. Commercial Union Ins. Co.,* 340 So. 2d 764 (Ala. 1976); and *Minyard v. Woodward Iron Co.,* 81 F. Supp. 414 (N.D. Ala. 1948), aff'd 170 F.2d 508 (5th Cir. 1948).

Howell simply commented in connection with its review of a lower court's order abating a nuisance caused by the overflow of sewage but failing to award any monetary damages, as follows:

> "It may not be out of place to observe, as to damages that are recurring and separable, that the right to recover, as to such damages not barred by statute, is not affected by the fact that other damages of the same character are barred by statute, provided the damages sustained within the statutory period are separable from those that are barred under the statute by the lapse of time."

234 Ala. at 162, 174 So. at 628. There was no issue in the case about when each item of damage had occurred.

In *Agricola Furnace,* the plaintiff in the lawsuit underlying his employer's declaratory-judgment action

against its insurer alleged that he had contracted silicosis and tuberculosis by his exposure to dust and metal particles in his 10 years of employment. The plaintiff claimed that "along about the first of May 1936 while so engaged [in his employment] he was made sick in that way," although his sickness "did not appear suddenly, violently or by accidental means but gradually appeared to grow progressively worse as a result of said continuous effect of said dust and particles of metal. . . ." 236 Ala. at 537, 183 So. at 678. The Court stated its understanding of the employee's complaint to be that his exposure was continuous, "but that in May 1936 he was for that cause made sick." 236 Ala. at 537, 183 So. at 679. The employee filed his action in November of that year; thus, there was no issue of its timeliness vis-à-vis the stated date of injury. The Court held that a tort "may be of a continuous sort, and, if so, a recovery may be had for all damages which occurred within the period of limitations," and that such a continuous tort could qualify as "an accident" under an insurance policy, "however difficult it may be to separate the amount of the damages done within the period of the statute of limitations from that occurring in the period preceding." 236 Ala. at 538, 183 So. at 679.

In *Minyard,* the federal district judge awarded the plaintiff, who had been exposed to silica dust from November 1945 until he quit his job for health reasons in September 1946, monetary damages representing the aggravation by that exposure of the employee's preexisting "silicotic condition." The judge held that Alabama's one-year statute of limitations "began to run from the last date on which plaintiff inhaled silica dust while employed by defendant. . . ." 81 F. Supp. at 417. Citing *Howell* and *Agricola Furnace,* among other cases, the judge concluded that under Alabama caselaw

> "a recovery may be had for injury resulting from a continuous tort subject to the limitation that only damages which occurred within the period of limitations may be recovered, provided that the damages sustained within the statutory period are separable from those that are barred under the statute by the lapse of time."

81 F. Supp. at 417. The United States Court of Appeals for the Fifth Circuit affirmed the district court's judgment, stating simply that it found no merit in the defendant's contention that the action was barred by Alabama's one-year statute of limitations. *Woodward Iron Co. v. Minyard,* 170 F.2d 508 (5th Cir. 1948).

Garren was a third-party-tortfeasor action by an employee who had suffered pulmonary injury "as a consequence of continuously breathing dust and lint" emanating from a machine she had operated on her job for several years, until she was forced to quit work on April 23, 1974. On April 22, 1975, she sued the manufacturer of the machine on a products-liability theory and her employer's insurance carrier on a negligent-safety-inspection theory.

> "Both defendants were granted partial summary judgments on the grounds that plaintiff's claims for relief, seeking to recover damages for injuries suffered more than one year prior to April 22, 1975, are barred by the one-year statute of limitations; further, any *damages* to which plaintiff might otherwise be entitled could not include those for any injuries suffered by plaintiff more than one year prior to April 22, 1975. Plaintiff appeals from these partial summary judgments. Rule 54(b), [Ala. R. Civ. P.]."

340 So. 2d at 766.

Thus, the issue in *Garren* was not when the statute of limitations had been triggered, but simply whether the plaintiff could recover damages for an injury that had occurred more than one year before the date she sued. Given the fact that plaintiff's right to file a third-party action arose out of the Workmen's Compensation Act, the Court reasoned that "the statute of limitations begins to run from the date of the injury, which is defined in [Code of Alabama, Tit. 26,] § 313(42) [of the Workmen's Compensation Act] as the date of the last exposure to the hazards of the disease which gave rise to the injury." 340 So. 2d at 765. That Code section (recodified at the time of *Garrett* as § 25-5-117) provided that *for the purpose* of bringing a workmen's compensation claim, "[t]he date of the injury shall mean . . . the date of the last exposure to the hazards of the disease in the employment of the employer in whose employment the employee was last exposed to the hazards of the disease."

However, as Justice Jones emphasized in his dissent in *Garrett* and his extended dissent on denial of application for rehearing in that case, the *Garren* Court's reliance on the workers' compensation Code section was "misplaced because the third-party common law action in *Garren* does not draw upon the Workmen's Compensation Act for its definition of date of injury." 368 So. 2d at 525. Justice Jones pointed out that if the Workmen's Compensation Act definition of date of injury had in fact applied, *Garren* should have been decided differently because under the Workmen's Compensation Act Ms. Garren would have been entitled to recover her full injuries, not just those incurred during the one-year period preceding the filing of her complaint. Justice Faulkner likewise explained in his

dissent in *Garrett* that "to engraft this [Workmen's Compensation Act] statutory scheme on unrelated common law claims is illogical and unsupported." 368 So. 2d at 523.

Recognizing the harsh effect of its holding, the *Garrett* majority encouraged the legislature to consider adopting a "discovery" rule, "so that a plaintiff's claim will not be barred when he has no way to ascertain that he has been damaged by a deleterious substance because the result has not *manifested* itself until the statute of limitations has run." 368 So. 2d at 521 (emphasis supplied). Noting that the legislature "'has the *inherent power* to determine the date and time within which an action may be brought unless the time fixed is clearly arbitrary or unreasonable,'" 368 So. 2d at 520 (quoting an earlier case), the Court stated:

> "It may be that Alabama's rejection of the 'Discovery Rule' is contrary to the weight of opinion generally. However, as this Court is committed to the proposition that the legislature has the *inherent power* to establish statutes of limitation, we have no other alternative than to leave it to the legislature to abrogate this rule and adopt a more equitable one should it see fit. . . ."

368 So. 2d at 521. Justice Shores in her dissent joined the majority in inviting the legislature to remedy the situation.

The legislature attempted to do just that later that year, enacting Act No. 79-468, Ala. Acts 1979, now codified as §§ 6-5-500 through -504. The legislation represented "a comprehensive system consisting of the time for commencement of actions, for discoverability of actions based on insidious disease and the repose of actions" and "a

complete and unified approach to the time in which product liability actions" might be brought. § 6-5-500. It contained, among other things, a "rule of discovery" whereby latent-injury cases resulting from exposure to toxic substances over a period of time could be brought within one year from the date that the injury "is or in the exercise of reasonable diligence should have been discovered by the plaintiff," and the cause of action was "deemed to accrue" at that time. § 6-5-502(b). Section 6-5-503 stated that the legislation would "apply only to product liability actions, wherein each element accrues after the effective date of this division, and no provision of this division shall have retroactive application." The legislature also included a 10-year absolute rule of repose measured from the date the product was first put to use, § 6-5-502(c), but that feature was declared unconstitutional in *Lankford v. Sullivan, Long & Hagerty,* 416 So. 2d 996 (Ala. 1982). This Court's decision in *Lankford* had the result of invalidating the entire act, because § 6-5-504 provided that "each section, clause, provision, or portion" of the act was to be deemed "inseparable and nonseverable from all others," and in the event any aspect of the legislation was declared invalid or unconstitutional "the entire [Act] and each section, clause, provision, or portion thereof shall be inoperative and have no effect." Therefore, after *Lankford* Act No. 79-468 was a "dead letter."

In 1980 the legislature enacted Act No. 80-566. Section 2 of that act, now codified as § 6-2-30(b), provides that asbestos-exposure claims "shall be deemed to accrue on the first date the injured party, through reasonable diligence, should have reason to discover the injury giving rise to such civil action." Although Section 3 of Act No. 80-566, stating that following its effective date the act would

"apply retroactively to all pending causes of action," was held unconstitutional in *Tyson v. Johns-Manville Sales Corp.,* 399 So. 2d 263 (Ala. 1981), as violating § 95, Ala. Const. 1901, the prospective "discovery rule" feature remains viable. Bills providing for the adoption of the discovery rule in all hazardous-exposure cases have been proposed in the legislature for at least the last three years, but have not been passed; Senate Bill 534 and Senate Bill 535 (2006 Regular Session); House Bill 659 and House Bill 660 (2005 Regular Session); and House Bill 93 and House Bill 103 (2004 Regular Session).

In his dissent in *Garrett,* Justice Jones noted the potentially anomalous result that logically could flow from the artificiality of the "last exposure" rule of accrual:

> "The holding of the majority says, or it may be fairly interpreted to say, that one so exposed can bring his action within the year of last exposure and be entitled to at least nominal damage – injury being presumed as a matter of law; or, having timely filed his claim, he may be able to delay trial to await the manifestations of injury and medical proof."

368 So. 2d at 528 (footnote omitted).

The flawed artificiality of the *Garrett* Court's choice of the last-exposure rule was evident when this Court had to apply it to the particular facts in *Hillis v. Rentokil, Inc.,* 596 So. 2d 888 (Ala. 1992). The plaintiff there suffered physical injury as a result of his exposure to chromated copper arsenate during the course of his employment from September 1985 to December 31, 1987, when his employment was terminated. His adverse physical symptoms had manifested well before that "last exposure," however, and

he had actually been diagnosed by a doctor on September 25, 1987, who advised him "to see a dermatologist because of an allergic reaction to the [chromated copper arsenate]." 596 So. 2d at 889. He did not file suit until November 15, 1989. Relying on the traditional rule that the running of the statute of limitations is triggered by the first actual damage, the defendant argued that the limitations period had begun to run, at the latest, by September 25, 1987, when the plaintiff's physical symptoms had progressed to the point that he had returned to see his doctor and had, in effect, received a diagnosis. Constrained by the *Garrett* last-exposure rule, however, this Court held that because the action was filed within two years after the date of last exposure, it was timely. Thus, in *Hillis* the last-exposure rule became a sword instead of a shield; an individual whose cause of action had clearly accrued under the conventional common-law approach, because he had experienced a manifest, present injury, was given the protection of the "last exposure equals first injury" rule of *Garrett.*

Although, as Justice See notes, this Court has consistently chosen to continue to follow in subsequent cases the last-exposure rule of *Garrett,* it has done so simply by accepting that holding at face value, under the constraint of stare decisis, without any reexamination of its underlying rationale.

Garrett's last-exposure rule is purely a "court made" rule, because § 6-2-30 then provided, and § 6-2-30(a) now provides, only that civil actions must be commenced within the applicable limitations period "after the cause of action has accrued." The *Garrett* Court simply declared, as a matter of policy rather than scientific fact, that a toxic-exposure cause of action accrues contemporaneously with

the last exposure to the toxic substance, it being judicially deemed that an injury has occurred at that time as a matter of law.

Neither *Garrett* nor any of its progeny articulate any scientific basis for that conclusion, and certainly the defendants in the present case do not argue that benzene exposure, even up through a last exposure, is known to cause concurrently some actual damage at the cellular level or otherwise to inflict an objectively ascertainable bodily injury.

Although it is undisputed that "the Legislature has the inherent power to enact a statute of limitations establishing the period within which a claim must be brought," *Baugher v. Beaver Constr. Co.,* 791 So. 2d 932, 934 n.1 (Ala. 2000), the question presented by this appeal is whether this Court should reexamine its construction in *Garrett* of the operative phrase in § 6-2-30, "after the cause of action has accrued" and interpret it differently than it did in *Garrett* for toxic-substance-exposure cases.

The Doctrine of Stare Decisis, and When Change in the Law is the Role of the Judiciary

"Stare decisis is '[t]he doctrine of precedent under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.' *Black's Law Dictionary,* 1443 (8th ed. 2004)." *Goldome Credit Corp. v. Burke,* 923 So. 2d 282, 292 (Ala. 2005). As we explained in *Burke:*

> "Stare decisis, however, 'is a golden rule, not an iron rule.'" *Ex parte Nice,* 407 So. 2d 874, 883 (Ala. 1981) (Jones, J., dissenting). At times 'this Court has had to recognize . . . that it is necessary

> and prudent to admit prior mistakes and to take the steps necessary to ensure that we foster a system of justice that is manageable and that is fair to all concerned.' *Foremost Ins. Co. v. Parham,* 693 So. 2d 409, 421 (Ala. 1997). As Justice Maddox has stated: '[W]hile we accord "due regard to the principle of stare decisis," it is also this Court's *duty* "to overrule prior decisions when we are convinced beyond . . . doubt that such decisions were wrong when decided or that time has [effected] such change as to require a change in the law."' *Ex parte State Farm Fire & Cas. Co.,* 764 So. 2d 543, 545-46 (Ala. 2000) (emphasis added) (quoting *Beasley v. Bozeman,* 294 Ala. 288, 291, 315 So. 2d 570, 572 (1975) (Jones, J., concurring specially)). See also *Ex parte Melof,* 735 So. 2d 1172, 1186 (Ala. 1999) ('"'courts are not bound by stare decisis to follow a previous interpretation [that is] later found to be erroneous'"' (quoting *Goodyear Tire & Rubber Co. v. J.M. Tull Metals Co.,* 629 So. 2d 633, 638 (Ala. 1993), quoting in turn 2B Norman J. Singer, *Sutherland Statutory Construction* § 49.05 at 16 (5th ed. 1992)))."

923 So. 2d at 292-93.

Admittedly, we stated in *Hexcel Decatur, Inc. v. Vickers,* 908 So. 2d 237, 241 (Ala. 2005), that "[w]hen revisiting this Court's interpretation of a statute, we will afford greater deference to the doctrine of stare decisis than we would if asked to revisit an interpretation of a constitutional provision." Nonetheless, this Court on a number of occasions has felt obliged to correct its earlier statutory construction, including *Burke,* supra. For example, in *Foremost Insurance Co. v. Parham,* 693 So. 2d 409 (Ala. 1997), one of the issues presented was when a fraud cause of action "accrued" under Ala. Code 1975, § 6-2-30(a), so as to

trigger the running of the limitations period of § 6-2-38(*l*). Before 1989, the Court had construed the term "accrued" in that context to mean that "a fraud claim accrued, thus commencing the running of the statutory limitations period, when the plaintiff discovered the fraud or when the plaintiff should have discovered the fraud in the exercise of reasonable care." 693 So. 2d at 417. Under the combined effect of *Hickox v. Stover,* 551 So. 2d 259 (Ala. 1989), and *Hicks v. Globe Life & Accident Insurance Co.,* 584 So. 2d 458 (Ala. 1991), that judicial interpretation was changed so that the theretofore recognized "reasonable reliance" standard was replaced by a "justifiable reliance" standard. Under that new construction, a person's reliance was to be judged only by what he or she *actually* knew of facts that would have put a reasonable person on notice of fraud. 693 So. 2d at 418. The Court determined in *Parham,* supra, that the reasonable-reliance standard had in fact been the proper construction for the statutory term "accrued" and overruled *Hickox* and *Hicks* on that point. In doing so, the Court declared:

> "Although this Court strongly believes in the doctrine of stare decisis and makes every reasonable attempt to maintain the stability of the law, this Court has had to recognize on occasion that it is necessary and prudent to admit prior mistakes and to take the steps necessary to ensure that we foster a system of justice that is manageable and that is fair to all concerned. See, e.g., *Jackson v. City of Florence,* 294 Ala. 592, 598, 320 So. 2d 68, 73 (1975), in which Justice Shores, writing for this Court, stated: 'As strongly as we believe in the stability of the law, we also recognize that there is merit, if not honor, in admitting prior mistakes and correcting them.'"

693 So. 2d at 421.

The Court further held in *Parham,* however, that

> "[b]ecause this return to the reasonable reliance standard represents a fundamental change in the law of fraud, we think it appropriate to make the new standard applicable in all fraud cases *filed* after the date of this decision, i.e., all cases filed after March 14, 1997."

693 So. 2d at 421.

In *Jackson v. City of Florence,* 294 Ala. 592, 320 So. 2d 68 (1975), the plaintiff/appellant sought "a re-evaluation of this court's construction" of a statute, acknowledging that in order for the plaintiff/appellant to prevail, the Court would have to overrule a line of cases extending for more than 60 years following the 1907 enactment of the statute. The interpretation accorded the statute during that period had occasioned opinions employing what the *Jackson* Court labeled a "judicial sleight of hand," the necessity for which "could have been avoided entirely by giving to the 1907 legislative enactment its clear meaning." 294 Ala. at 597, 320 So. 2d at 72. In choosing to correct its erroneous construction of the statute, despite the fact that the legislature had reenacted the statute without change as a part of its adoption of the Codes of 1923 and 1940, the Court had the following to say:

> "No one believes in the validity of the rule of stare decisis and the necessity for stability in the law more than we do. . . .
>
> ". . . .
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> "As strongly as we believe in the stability of the law, we also recognize that there is merit, if not honor, in admitting prior mistakes and correcting them. The city here argues that the failure

> of the legislature to act in this area constitutes its approval of the construction placed on its enactments by this court. It is equally arguable, as noted by Justice Currie, concurring specially in *Holytz v. City of Milwaukee,* 17 Wis. 2d 26, 115 N.W.2d 618, 626 (1962), that ' . . . they (the legislature) deferred to the supposed wisdom of the court, or else determined that the court should correct its own mistakes,' or as Judge Moremen of the Court of Appeals of Kentucky responded to the same argument in *Haney v. City of Lexington, (Ky.),* 386 S.W.2d 738, 741 (1964):
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> "' . . . It seems to us that an equally reasonable assumption is that the legislature might expect the courts themselves to correct an unjust rule which was judicially created. . . .'"

294 Ala. at 597-98, 320 So. 2d at 73.

More recently, we explained in *Ex parte State Farm Fire & Casualty Co.,* 764 So. 2d 543, 545-46 n.3 (Ala. 2000):

> " . . . The doctrine of *stare decisis* tends to produce certainty in our law, but it is important to realize that certainty *per se* is but a means to an end, and not an end in itself. Certainty is desirable only insofar as it operates to produce the maximum good and the minimum harm and thereby to advance justice. . . . When it appears that the evil resulting from a continuation of the accepted rule must be productive of greater mischief to the community than can possibly ensue from disregarding the previous adjudications on the subject, courts have frequently and wisely departed from precedent, 14 *Am.Jur., Courts,* § 126."

In *Lloyd v. Service Corp. of Alabama, Inc.*, 453 So. 2d 735 (Ala. 1984), the Court, having determined that a change from the law as previously declared by it was necessary, proceeded to determine whether the change "should be effected by the judiciary." 453 So. 2d at 740. The Court's analysis of that issue was as follows:

> "First, the judiciary originally created this rule of law. It has not been altered, amended, or expanded upon by our legislative body. In this circumstance, where a judicial creation has become outmoded or unjust in application, it is more often appropriate for the judicial body to act to modify the law. Further, it is not uncommon for the Legislature to defer to the court's wisdom regarding such a rule of law. See *Jackson v. City of Florence,* 294 Ala. 592, 320 So. 2d 68, 73 (1975); *Haney v. City of Lexington,* 386 S.W.2d 738, 741 (Ky. 1964); and *Holytz v. City of Milwaukee,* 17 Wis.2d 26, 115 N.W.2d 618, 626 (1962). *McAndrew v. Mularchuk,* 33 N.J. 172, 193, 162 A.2d 820, 832 (1960).
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> "Second, this is a tort law issue. An unjust tort law may *indirectly* affect every citizen of the state, but it will almost never *directly* affect enough people at any given point in time to generate a great deal of attention. It is not likely, therefore, to be placed on the Legislature's crowded agenda for consideration. For that reason, tort law issues are, when certain other factors are present, proper subjects for judicial reform.
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> "Last, when it has determined that a judicially created law is unjust in its application, this court cannot long permit itself to be used as an instrument of inequity by refusing to act to

> change the law. To do so undermines our credibility in the public perception. The judicial branch of government cannot avoid action. It must continuously apply the law to resolve the conflicts between citizens of this state. To continue to apply a judicially created rule this court has recognized as obsolete and unjust is a violation of its integrity."

453 So. 2d at 740.

Given the legislative history recited earlier, particularly the legislature's prompt response to this Court's decision in *Garrett* by enacting Act No. 79-468 (Ala. Code 1975, §§ 6-5-500 through -504) so as to register its disagreement with the holding in *Garrett,* I do not view the legislature's failure to act further than it has done in this area to constitute its approval of the construction this Court has placed on the statutory term "accrued" in toxic-exposure cases. Since *Garrett,* this Court has again and again reaffirmed the proposition acknowledged but ignored in *Garrett* – that there are cases where the defendant's act does not cause a contemporaneous injury to the plaintiff, but an injury later manifests as a result of, and in furtherance and subsequent development of, the defendant's act. See, e.g., *Ex parte Stonebrook Dev., LLC,* 854 So. 2d 584 (Ala. 2003); *Hinton ex rel. Hinton v. Monsanto,* 813 So. 2d 827 (Ala. 2001); *Payton v. Monsanto,* 801 So. 2d 829 (Ala. 2001); *Ex parte Floyd,* 796 So. 2d 303 (Ala. 2001); *System Dynamics Int'l, Inc. v. Boykin,* 683 So. 2d 419 (Ala. 1996); *Smith v. Medtronic, Inc.,* 607 So. 2d 156 (Ala. 1992); and *Payne v. Alabama Cemetery Ass'n, Inc.,* 413 So. 2d 1067 (Ala. 1982). In *Hinton,* the Court was asked in a certified question from a federal district court whether Alabama law recognized a cause of action for medical monitoring following hazardous-substance exposure when

the plaintiffs were not claiming any present injury or illness. Based on that precise set of facts, the Court concluded that Alabama law "provides no redress for a plaintiff who has no present injury or illness" because, as the plurality opinion explained, "Alabama law has long required a manifest, present injury before a plaintiff may recover in tort." 813 So. 2d at 831-32, 829.

In his special writing concurring in the result, which I joined, Justice Lyons observed:

> "Turning to the question as phrased by the district court, this Court, dealing with a similar issue involving the accrual of a cause of action for radiation exposure, stated the question as follows: 'When does the statute of limitations begin to run for injuries suffered as a result of radiation exposure?' *Garrett v. Raytheon Co.*, 368 So. 2d 516, 517-18 (Ala. 1979). This Court then answered the question as follows: 'We conclude that it begins to run when the plaintiff is exposed to radiation *and an injury occurs.*' *Id.* (emphasis added). Recently, in *Payton v. Monsanto Co.*, 801 So. 2d 829, 835 (Ala. 2001), this Court quoted *Ex parte Floyd*, 796 So. 2d 303, 308 (Ala. 2001):
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> > "'"Thus, if the act complained of does not in and of itself constitute a legal injury on the date on which it was performed, the cause of action does not accrue on that date. It is only when the first legal injury occurs that the cause of action accrues and the limitations period begins to run."'"

813 So. 2d at 832.

In *Southern Bakeries, Inc. v. Knipp,* 852 So. 2d 712 (Ala. 2002), addressing the issue of what constitutes an "injury" under § 6-2-30(b), Ala. Code 1975, sufficient for a cause of action for exposure to asbestos to accrue, the Court had this to say:

> "Alabama has long required a manifest, present injury before a plaintiff may recover in tort.[7] *Hinton v. Monsanto Co.,* 813 So. 2d 827, 829 (Ala. 2001); see also *DeArman v. Liberty Nat'l Ins. Co.,* 786 So. 2d 1090 (Ala. 2000); *Stringfellow v. State Farm Life Ins. Co.,* 743 So. 2d 439 (Ala. 1999); *Williamson v. Indianapolis Life Ins. Co.,* 741 So. 2d 1057 (Ala. 1999); *Ford Motor Co. v. Rice,* [726 So. 2d 626 (Ala. 1998)]; *Pfizer, Inc. v. Farsian,* 682 So. 2d 405 (Ala. 1996). The plaintiff in *Hinton* did not allege that he sustained a physical injury or an illness as a result of his exposure to polychlorinated biphenyls ('PCBs'); instead, he sought to recover the cost of medical monitoring he alleged was made necessary by his exposure to PCBs. 813 So. 2d at 828. In *Hinton,* a plurality of this Court held that Alabama law provides no redress for a plaintiff who has suffered no present injury or illness. 813 So. 2d at 831-32.
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> "[7] It is a basic principle of tort law that in negligence cases, the plaintiff must suffer actual injury; the threat of future harm, not yet realized, is not enough. W. Page Keeton et al., *The Law of Torts* § 30 at 165 (5th ed. 1984). . . ."

852 So. 2d at 716-17.

As things now stand, and as left in placed by the majority in this case, the law in this State would seem to be this: A person exposed to a toxic substance having the

potential to cause disease on a delayed basis, but who has suffered no manifest, present injury within two years thereafter, may not file an action within that two-year period. *Hinton,* supra; *Southern Bakeries,* supra. If, after two years, that same person in fact suffers an injury from the exposure and files an action, the action will be dismissed on the basis that it should have been filed earlier. Thus, no matter when the person attempts to file the action, it is either too soon or too late. This is a classic Catch-22,[6] and one that would seem to violate Art. 1, § 13, Ala. Const. 1901, which provides, in pertinent part, "that every person for any injury done him . . . shall have a remedy by due process of law."

Perhaps, however, I am mistaken in understanding that the interaction of the rule in *Garrett* and our more recent caselaw serves to disallow the maintenance of a personal-injury tort claim after exposure to a toxic substance but in advance of a manifest, present injury. After all, as noted earlier, Justice Jones forecast in his dissent in *Garrett* that "one so exposed can bring his action within the year [now two years] of last exposure without medical proof of . . . damage – injury being presumed as a matter of law." 368 So. 2d at 528. In fact, the defendants embraced this view of the *Garrett* rule when they asserted in their initial brief to this Court that Cline "was entitled to sue these defendants for his exposure to benzene at Griffin Wheel from the first day he was exposed to benzene there to any time up to and including the day two years after he was last exposed there to benzene supplied by the

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[6] "Catch-22: a frustrating situation in which one is trapped by contradictory regulations or conditions." *Random House Webster's Unabridged Dictionary* (2d ed. 2001).

defendants. . . ." (Appellee's brief, p. 43.) If this then is the correct state of the law, why could not the plaintiff in such a situation, after asserting a "*Garrett* injury," claim as additional damage mental anguish stemming from his or her fear of subsequently developing disease? And why could not the plaintiff in such a case, if asserting claims of fraudulent suppression, misrepresentation, and/or wantonness (as in *Southern Bakeries,* supra), additionally maintain a demand for punitive damages? All without any proof of any manifest, present injury.

The number of persons eligible to *file* an action if all that is required is some period of exposure to a toxic substance is potentially huge. See *Ex parte BASF Corp.,* [Ms. 1051060, Oct. 27, 2006] ___ So. 2d ___ (Ala. 2006) (1,600 plaintiffs); *Ex parte Flexible Prods. Co.,* 915 So. 2d 34 (Ala. 2005) (1,675 plaintiffs); and *Ex parte Monsanto Co.,* 862 So. 2d 595 (Ala. 2003) (3,500 plaintiffs).

I submit that under either view of the implications of the *Garrett* rule, the law is confounded; thus, a continued blind obedience to that rule, simply in deference to stare decisis, does not serve the law, but rather greatly disserves it. As the Court explained in *Ex parte First Alabama Bank,* 883 So. 2d 1236, 1245 (Ala. 2003):

> "Justice Houston, writing specially in *Southern States Ford, Inc. v. Proctor,* 541 So. 2d 1081 (Ala. 1989), embraced a useful standard for weighing the need for change against the advantages of settled principles of law under the doctrine of stare decisis. He posed the question as follows: whether the ratio decidendi of earlier precedent would '"hypothetically be consented to today by the conscience and the feeling of justice of the majority of all those whose obedience

> is required by [that] rule of law?"' *Southern States Ford, Inc.,* 541 So. 2d at 1093 (quoting Laun, *Stare Decisis,* 25 Va. L.Rev. 12, 22 (1938))."

Surely the conscience and feeling of justice of the majority of those whose obedience would be required to a rule that says an action filed by a victim of delayed-onset injury from toxic-substance exposure will always be disallowed as either premature or too mature would be shocked. On the other hand, similar shock would surely be the reaction of the majority of those required to accept a rule that would permit anyone and everyone exposed to a toxic substance to maintain a tort action even though that person had not yet suffered, and statistically would probably never suffer, any health problem as a result of that exposure.

Based on the foregoing analyses, I conclude that the *Garrett* construction of the § 6-2-30(a) phrase "after the cause of action has accrued" in toxic-substance-exposure situations should be corrected, that it should be corrected now, and that this Court should undertake the correction rather than abdicating that responsibility to the legislature.

Construction of "Accrued"

The proper construction of the term "accrued" in § 6-2-30(a) in the context of toxic-substance-exposure cases should honor the rule that a cause of action accrues only when there has occurred a manifest, present injury. I understand "manifest" in this context to mean an injury manifested by observable signs or symptoms or the existence of which is medically identifiable. "Manifest" in this sense does not mean that the injured person must be

personally aware of the injury or must know its cause or origin. All that is required is that there be in fact a physical injury manifested, even if the injured person is ignorant of it for some period after its development. This approach is mandated by the rule stated as early as *Kelly v. Shropshire,* 199 Ala. 602, 605, 75 So. 291, 292 (1917), and as late as *Gilmore v. M & B Realty Co., LLC,* 895 So. 2d 200, 208 (Ala. 2004), and on innumerable occasions in between, that "plaintiff's ignorance of the tort or injury, at least if there is no fraudulent concealment by defendant, [does not] postpone the running of the statute [of limitations] until the tort or injury is discovered." An oft-declared companion rule is that "this Court will not apply the discovery rule unless it is specifically prescribed by the Legislature." *Travis v. Ziter,* 681 So. 2d 1348, 1354 (Ala. 1996).

We operate within our proper sphere when we undertake to determine the construction that should be ascribed to the legislatively prescribed term "accrued" in § 6-2-30(a); we would operate outside that sphere were we to attempt to add to the text of § 6-2-30(a) so as to superimpose some sort of discovery feature. Thus, I reject the notion that our prior and present requirement of a "manifest," present injury means that the injury must be obvious to and known by the injured party. That would simply represent the creation of a type of discovery rule. I reaffirm that creation of a discovery rule lies within the province of the legislature, which is equipped to weigh the competing public-policy arguments and to fashion variations of discovery principles tailored to the particular nature of each affected cause of action. The legislature has shown its special capability in that regard by structuring variations of discovery features in the following statutes:

§ 6-2-3; § 6-2-30(b); § 6-5-482; § 6-5-502(b); § 6-5-574(a); § 7-2A-506(2); § 8-19-14; § 8-26A-16(c); and § 8-27-5.

Thus, as used in the phrase "manifest, present injury," the word "manifest" designates a condition that has evidenced itself sufficiently that its existence is objectively evident and apparent, even if only to the diagnostic skills of a physician.

> "An injury manifests itself 'when it has become evidenced in some significant fashion, whether or not the patient/plaintiff actually becomes aware of the injury.' (*Marriage & Family Center v. Superior Court* (1991) 228 Cal. App. 3d 1647, 1654 [279 Cal. Rptr. 475])."

Photias v. Doerfler, 45 Cal. App. 4th 1014, 1021, 53 Cal. Rptr. 2d 202, 206 (1996), abrogated on other grounds by *Arredondo v. Regents of Univ. of Cal.,* 131 Cal. App. 4th 614, 619, 31 Cal. Rptr. 3d 800 (2005).

Moreover, this case does not properly present the issue whether a discovery feature should apply, because Cline claims that his injury occurred on the date of his diagnosis of acute myelogenous leukemia, and there is no present argument by the defendants that the actual onset of the disease had accrued at some earlier time.

The defendants argue that apart from the statute-of-limitations issue there were failure-of-proof bases on which the trial court should have entered a summary judgment in their favor, and this Court could rely on those bases to affirm that judgment. They acknowledge that the trial court did not reach those issues, but they invoke the principle of appellate procedure that this Court may affirm the judgment of a trial court on any valid ground presented by the record, regardless of whether the ground

was considered, or even if it was rejected, by the trial court. See *Unum Life Ins. Co. of America v. Wright,* 897 So. 2d 1059, 1082 (Ala. 2004). Because I would not affirm the summary judgment here based on a statute-of-limitations ground, it behooves me to explain why I do not explore the option of affirming that judgment based on other grounds.

This Court unhesitatingly resorts to the device of affirming a trial court's judgment on an alternative basis if to do otherwise would have us apply an incorrect rule of law to the parties' circumstances. See *Blue Cross & Blue Shield of Alabama v. Hodurski,* 899 So. 2d 949, 960 (Ala. 2004). Nonetheless, the decision to affirm a trial court's ruling on an alternative basis is discretionary with the appellate court. E.g., *Tualatin Valley Builders Supply, Inc. v. TMT Homes of Oregon, Inc.,* 179 Or. App. 575, 31 P.3d 1006 (2002); *Frady v. Morrow,* 169 Or. App. 250, 255-56, 9 P.3d 141, 144 (2000); and *Busch v. Graphic Color Corp.,* 169 Ill. 2d 325, 662 N.E.2d 397, 214 Ill. Dec. 831 (1996). I would decline to exercise our discretion to invoke that principle under the circumstances presented by this case. It was necessarily clear to the trial court, obliged as it was to apply the last-exposure rule of *Garrett,* that the case had to be dismissed because the statute of limitations had expired. Thus, it was not just that the trial court failed to consider other possible bases for entering a summary judgment, it was effectively precluded from doing so.

The defendants principally argue that Cline's evidence failed sufficiently to establish the element of causation required under the Alabama Extended Manufacturer's Liability Doctrine, but the trial court's reliance on the *Garrett* rule effectively eliminated causation as an issue. That is to say, if a last exposure effects a legally cognizable injury as a matter of law, then one need not prove actual

causation. Additionally, Cline's counsel asserts, and submits arguably supportive materials, that he forwent fully developing certain evidentiary aspects once it became evident that the trial judge was going to dispose of the case on the basis of the statute of limitations, and Cline's counsel came to understand that counsel for the defendants was in agreement that the planned appeal would focus solely on that issue.

Presumably because of its determination early on that *Garrett* clearly would require a dismissal of the claims against the defendants, the trial court did not address certain challenges they made to the admissibility and adequacy of some of Cline's evidentiary submissions. Because the construction of "accrued" in § 6-2-30(a) that I advocate as the proper one would so alter the analytical approach the trial court would have taken had it had the benefit of that rule, I would deem it appropriate to afford the trial court the opportunity to address on the merits the defendants' evidentiary-challenge arguments.

Retroactive Versus Prospective Application of the New Standard Proposed by this Dissent

Although my position was not adopted by the majority of the Court, I nonetheless believe a discussion of the reasons favoring a prospective application of a new accrual rule for toxic-substance-exposure cases is in order.

> "'The determination of the retroactive or prospective application of a decision overruling a prior decision is a matter of judicial discretion that must be exercised on a case-by-case basis.' *Ex parte Coker,* 575 So. 2d 43, 51 (Ala. 1990), citing *City of Birmingham v. Blount County,* 533 So. 2d 534 (Ala. 1988); *State Dep't of Revenue v.*

> *Morrison Cafeterias Consol., Inc.,* 487 So. 2d 898 (Ala. 1985). Although circumstances occasionally dictate that judicial decisions be applied prospectively only, retroactive application of judgments is overwhelmingly the normal practice. *McCullar v. Universal Underwriters Life Ins. Co.,* 687 So. 2d 156 (Ala. 1996) (plurality opinion). 'Retroactivity "is in keeping with the traditional function of the courts to decide cases before them based upon their best current understanding of the law. . . . It also reflects the declaratory theory of law, . . . according to which the courts are understood only to find the law, not to make it."' 687 So. 2d 156, quoting *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 535-36, 111 S.Ct. 2439, 2443-44, 115 L.Ed.2d 481 (1991). While reliance upon prior law is an 'important variable that must be appraised in every case presenting questions of prospectivity,' we conclude that, as a policy matter, the application of this newly adopted rule to these parties 'rewards the prevailing party on the appeal, thereby providing "an incentive for litigants to challenge existing rules of law that are in need of reform."' *Hosea O. Weaver & Sons, Inc. v. Towner,* 663 So. 2d 892, 899 (Ala. 1995), quoting *Prospective Application of Judicial Decisions,* 33 Ala. L.Rev. 463, 473 (1982)."

Professional Ins. Corp. v. Sutherland, 700 So. 2d 347, 352 (Ala. 1997).

> "Because the rule stated in this opinion would change this Court's construction of the limitations provision of § 6-5-547(a) and reject its previous construction of the statute, a construction [the plaintiff] may have relied on, we would apply this new rule prospectively only, i.e., to legal-malpractice actions filed after the date of this

> decision. See *Professional Ins. Corp. v. Sutherland,* 700 So. 2d 347, 351-52 (Ala. 1997); *Foremost Ins. Co. v. Parham,* 693 So. 2d 409, 421 (Ala. 1997); *McCullar v. Universal Underwriters Life Ins. Co.,* 687 So. 2d 156, 165-66 (Ala. 1996)."

Ex parte Panell, 756 So. 2d 862, 869 (Ala. 1999) (plurality opinion of three Justices, but all six remaining Justices concurred in the result, thus joining in the decision for prospective relief only).

> "The United States Supreme Court has suggested consideration of the following factors in choosing whether to apply a judicial decision prospectively:
>
> > "'First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e.g., *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* [392 U.S. 481, 496, 88 S.Ct. 2224, 2233, 20 L.Ed.2d 1231 (1968)] . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., *Allen v. State Board of Elections,* [393 U.S. 544, 572, 89 S.Ct. 817, 835, 22 L.Ed.2d 1 (1969)]. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker,* [381 U.S. 618, 629, 85 S.Ct. 1731, 1737-38, 14 L.Ed.2d 601 (1965)]. Finally, we have weighed the inequity imposed by retroactive application, for

> "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."'
>
> "*Chevron Oil Co. v. Huson,* 404 U.S. 97, 106-07, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971)[, but see *Harper v. Virginia Dep't of Taxation,* 509 U.S. 86 (1993)]."

McCullar v. Universal Underwriters Life Ins. Co., 687 So. 2d 156, 165 (Ala. 1996).

My view of the proper construction to be accorded the term "accrued" in § 6-2-30(a) in the context of toxic-substance-exposure cases would establish a new principle of law by overruling clear past precedent on which litigants *may* have relied. This consideration weighs in favor of a prospective application of the principle, as does the purpose of time limitations for filing actions. On the other hand, Cline, as the prevailing party in bringing about a change in the law should be rewarded for his efforts and to deny him the benefit of the new rule would have a chilling effect on litigants who desire to challenge existing rules of law that are in need of reform. Weighing the merits and demerits of the possible options for effectuating the new rule, I would recommend that it be accorded a completely prospective operation, save only for its application in Cline's case, where it would apply retroactively. Therefore, except for Cline, only those persons whose last exposure to a toxic substance, and first manifest injury resulting from that exposure, occurred within two years of the opinion adopting the new rule would be entitled to have the

accrual of their cause of action determined according to the new rule.

By this approach, there would be no "flood gates of litigation" opened, and only if the legislature chose to refrain from any action for many years would there eventually develop the potential for a significant lag time between last exposure and manifest, present injury. Likewise, this approach would answer the concerns of the specially concurring Justices about the presentation of "stale" claims. Claims could become stale, in the sense of there being a significant temporal separation between cause and effect, only if the legislature is satisfied with the new rule and forgoes for a decade or more any legislative adjustment. (It bears noting, moreover, that under the *Garrett* rule, a claim is "fresh" only at a time when it is not actionable, and when it finally becomes actionable, upon the occurrence of a manifest, present injury, it is necessarily impermissibly "stale" under the statute of limitations.)

I do not seek to preempt the legislature by having this Court correct the erroneous *Garrett* rule. I simply take the position that the Court, having created the rule, should assume the responsibility for overruling it and replacing it with a rule that conforms to established principles for determining when a tort cause of action accrues. Thereafter, the Court having corrected its own mistake, I would welcome further legislative action aimed at providing any different rules for accrual, including those incorporating a "discovery" feature, that the legislature might determine to be in order. I therefore would reverse the trial court's judgment and remand this case to the trial court so that it might gauge the accrual of Cline's Alabama Extended Manufacturer's Liability Doctrine cause of action under the new rule, as well as consider the other grounds the

defendants asserted in support of their motion for a summary judgment.

Lyons, Woodall, and Parker, JJ., concur.

IN THE SUPREME COURT OF ALABAMA

[LOGO]

February 7, 2007

1041076

Jack Cline v. Ashland, Inc., et al. (Appeal from Bessemer Division of Jefferson Circuit Court: CV-01-423).

CERTIFICATE OF JUDGMENT

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on January 5th 2007:

Application Granted; No-Opinion Affirmance of October 4, 2005, Withdrawn; Affirmed. No opinion.

SEE, J. – Nabers, C.J., and See, Stuart, Smith, and Bolin, JJ., concur specially. Lyons, Harwood, Woodall, and Parker, JJ., dissent.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that the costs of this cause are hereby taxed against the appellant as provided by Rule 35, Ala. R. App. P.

I, Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 7th day of February, 2007.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE SUPREME COURT
OCTOBER TERM, 2005-2006

1041076

Jack Cline v. Ashland, Inc., et al. (Appeal from Jefferson Circuit Court, Bessemer Division: CV-01-423).

(Filed Oct. 14, 2005)

HARWOOD, Justice.

AFFIRMED. NO OPINION.

See Rule 53(a)(1), (a)(2)(A), and (a)(2)(E), Ala. R. App. P.

Nabers, C.J., and See, Stuart, and Bolin, JJ., concur.

RLP, GAC

IN THE SUPREME COURT OF ALABAMA

[LOGO]

November 1, 2005

1041076

Jack Cline v. Ashland, Inc., et al. (Appeal from Bessemer Division of Jefferson Circuit Court: CV-01-423).

CERTIFICATE OF JUDGMENT

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on October 14th 2005:

Affirmed. No opinion.
HARWOOD, J. – Nabers, C.J., and See, Stuart, and Bolin, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that the costs of this cause are hereby taxed against the appellant as provided by Rule 35, Ala. R. App. P.

I, Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 1st day of November, 2005.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

RLP, GAC

IN THE CIRCUIT COURT FOR
JEFFERSON COUNTY, ALABAMA
BESSEMER DIVISION

JACK CLINE,	§	
Plaintiff,	§	
	§	CIVIL ACTION NO.
vs.	§	
	§	CV-2001-423
ASHLAND, INC,; BP AMOCO CHEMICAL COMPANY, INC;	§	
BP AMOCO CORPORATION;	§	
CHEVRON CHEMICAL COMPANY; EXXON MOBIL CORPORATION; et al.,	§	
Defendants.	§	

ORDER ON MOTION FOR SUMMARY JUDGMENT

(Filed Mar. 29, 2005)

This motion is before the Court on the Motion for Summary Judgment of Defendants Ashland, Inc., Chevron Phillips Chemical LP, successor in interest to Chevron Chemical Company, LLC, and Exxon Mobil Corporation. The Court has considered the pleadings, the arguments of counsel, and the controlling law, and for the reasons set forth below, such motion is GRANTED.

This is a personal injury action in which plaintiff contends that he acquired acute myelogenous leukemia as a proximate result of his repeated exposures to benzene over many years. Plaintiff contends that he was exposed to pure benzene manufactured or supplied by defendants Ashland, Inc., Chevron Phillips Chemical LP, and Exxon Mobil Corporation while employed as a plant chemist for Griffin Wheel Company in Bessemer, between 1979 and

1987. Plaintiff concedes that he was last exposed to benzene supplied by these defendants in 1987 or earlier.

Within two years prior to the date on which he filed this lawsuit in 2001, plaintiff used a product known as Thompson's Water Seal, a product manufactured by Thompson & Formby Company, a former defendant in this matter. Plaintiff has offered evidence in opposition to the Motion for Summary Judgment that the Thompson product he used within two years before filing his lawsuit contained benzene.[1] The Court concludes that plaintiff's recent exposures to benzene supplied by Thompson & Formby, while sufficient to preserve his claims against that defendant, do not resurrect his claims against Ashland, Chevron, and/or Exxon-Mobil; plaintiff's claims against those defendants expired within two years of his last exposures to their products (1989), or within four years of the last tender of delivery of benzene by any of them to which he was exposed (1991). Accordingly, plaintiff's claims were barred by the statutes of limitation at the time this lawsuit was filed.

DONE this 8th day of ~~January~~ March, 2005.

/s/ Dan C. King, III
DAN C. KING, III
CIRCUIT COURT JUDGE

[1] The evidence submitted by plaintiff in this regard consists of a laboratory certificate from Guardian Systems, Inc. finding 6,200 mg/kg benzene content in Thompson's Water Seal. (Exhibit 8 to Plaintiff's Response to All Defendants' Motions for Summary Judgment). On June 28, 2004, defendants served a Motion to Strike such evidence, contending that it is inadmissible hearsay. That Motion to Strike is DENIED.

THE CIRCUIT COURT
FOR THE TENTH JUDICIAL CIRCUIT
JEFFERSON COUNTY, ALABAMA
BESSEMER DIVISION

JACK CLINE,	§	**Civil Action No.**
Plaintiff,	§	**CV-2001-423**
	§	
vs.	§	
ASHLAND, INC., et al.,	§	
	§	
Defendants.	§	

AMICUS CURIAE BRIEF OF ENVIRONMENTAL LITIGATION GROUP, P.C. IN RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COMES NOW Environmental Litigation Group, P.C. and files this amicus curiae brief in response to *Motion for Summary Judgment of Defendants Ashland, Inc., Chevron Phillips Chemical LP, Successor in Interest to Chevron Chemical Company, LLC, and Exxon Mobil Corporation*, stating as follows:

INTEREST OF AMICUS CURIAE ENVIRONMENTAL LITIGATION GROUP, P.C.

Environmental Litigation Group, P.C. is a law firm that regularly represents victims of exposure to toxic substances, and it understands from the plaintiff's counsel that this court has consented to the filing of this brief. This brief does not concern every issue raised by the defendants, but is instead limited to the accrual of the statute of limitations in actions under the Alabama Extended Manufacturers' Liability Doctrine ("AEMLD").

ISSUES

1. Is a plaintiff prosecuting an AEMLD claim required (or even permitted) to file a lawsuit before he has a manifest present injury?

2. When is an AEMLD plaintiff first entitled to file his lawsuit?

3. Is it constitutionally permissible for a manufacturer to escape any liability under the Alabama Extended Manufacturer's Liability Doctrine for the toxic and deadly products it places into the stream of commerce merely because the death and disease caused by those products occur more than two years after exposure?

DISCUSSION

In their brief, the defendants smugly declare, "Plaintiff asks this Court to disregard eighty years of Alabama jurisprudence and adopt the 'discovery rule' that the Alabama Supreme Court has flatly rejected time and time again." (Defendants' Brief, p. 14). In making this bold assertion, the defendants do not identify the cases that they contend establish the "eighty years of Alabama jurisprudence" and they do not distinguish between cases governed by the statutory accrual rule set forth in ALA. CODE § 6-2-30 and cases governed by other, very different statutory accrual rules.

The general accrual rule that governs this case, ALA. CODE § 6-2-30, *contains no provision mandating that any cause of action accrue on exposure*. It provides only that any civil action it governs "must be commenced after the

cause of action has accrued."[1] In attempting to establish their "eighty years of Alabama jurisprudence," the defendants cite only a handful of cases arising under ALA. CODE § 6-2-30, and instead direct this court's attention to cases involving workers' compensation claims and claims for breach of warranty – claims that are governed by unique statutes with their own distinct accrual rules.

Workers' compensation cases are governed by ALA. CODE § 25-5-117 (1975), which, unlike ALA. CODE § 6-2-30, *specifically provides that workers' compensation claims for occupational exposure accrue on exposure.* Thus, the workers' compensation cases cited by the defendants are irrelevant. Those cases include *American Mutual Liability Insurance Co. v. Phillips*, 491 So.2d 904 (Ala. 1986), *Barron v. CNA Insurance Company*, 678 So. 2d 735 (Ala. 1996), *Gattis v. NTN-Bower Corporation*, 627 So.2d 437 (Ala.Civ.App. 1993), *American Cyanamid v. Shepherd*, 668 So.2d 26 (Ala.Civ.App. 1995), and *Flesher v. Saginaw Division, General Motors Corporation*, 689 So. 2d 113 (Ala.Civ.App. 1996).

Breach of warranty cases are also governed by their own statutory accrual rule, ALA. CODE § 7-2-725 (1975), which *specifically provides that claims for a breach of warranty accrue when the breach occurs.* Thus, the breach of warranty cases cited by the defendants are also irrelevant. Those cases include *Simmons v. Clemco Industries*, 368 So.2d 509 (Ala. 1979), *Mayo v. Rouselle Corp.*, 375

[1] Subsection (b) of that section adds that a cause of action for exposure to asbestos "shall be deemed to accrue on the first date the injured party, through reasonable diligence, should have reason to discover the injury giving rise to such civil action."

So. 2d 449 (Ala. 1979), and *Bullen v. Roto Finishing Systems*, 435 So.2d 1256 (Ala. 1983).

The defendants cite just three cases that are relevant to the accrual of the cause of action in the instant case. These three cases were decided in the space of eighteen – not eighty – years, and they do not compel the result urged by the defendants. The principal case upon which the defendants rely is *Garrett v. Raytheon Co.*, 368 So.2d 516 (Ala. 1979), which the defendants contend established a "last exposure" accrual rule (Defendants' Brief, p. 15). This, however, is not what the court in *Garrett* did. Indeed, the majority opinion in *Garrett* began by recognizing the long-standing principle of Alabama law that a cause of action accrues only after the plaintiff is entitled to maintain an action thereon:

> The very basic and long settled rule of construction of our courts is that a statute of limitations begins to run in favor of the party liable from the time the cause of action "accrues." The cause of action "accrues" as soon as the party in whose favor it arises is entitled to maintain an action thereon. 368 So.2d 518-519.

The *Garrett* opinion did not alter this ancient principle, but instead simply found, as a matter of law, that the plaintiff's cause of action in that case had accrued upon exposure. Of course, this finding of fact made by the *Garrett* court is inconsistent with the ancient principle it touted. Moreover, to make matters worse, the *Garrett* court, like the defendants in the instant case, relied upon workers' compensation cases, which, as noted above, are governed by a distinct exposure accrual rule that is inapplicable in other tort cases. Finally, the *Garrett* decision is inconsistent with two much more recent decisions in which

the court specifically found that toxic tort claims accrue only after the plaintiff has developed a "manifest present injury" – i.e., been diagnosed with disease.

In *Thomas v. BSE Indust. Contractors*, 624 So.2d 1041 (Ala. 1993), the Alabama Supreme Court refused to permit a plaintiff that had been exposed to asbestos to prosecute an action based on the tort of outrage. In so ruling, the Court declared that there were no "clinical indications that [plaintiff] has been injured by his exposure." 624 So.2d at 1045. In *Hinton v. Monsanto Co.*, 813 So.2d 827 (Ala. 2001), the Alabama Supreme Court refused to permit an action for medical monitoring of individuals exposed to PCBs, declaring that "Alabama law has long required a manifest present injury before a plaintiff may recover in tort." 813 So.2d at 829. In applying this principle, the Court declared that although they had been exposed to PCBs, the class members *had not yet been injured*. 813 So.2d at 828. As stated above, the *Garrett* decision did not overrule the principle that a cause of action accrues only after the party in whose favor it arises is entitled to maintain an action thereon – it simply found as a matter of law that Garrett's claim had accrued on exposure. But the court appears to have retreated from this position in both *Thomas* and *Hinton*, in which it found that no cause of action could accrue until the development of disease.[2]

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[2] The *Thomas* and *Hinton* decisions did not expressly overrule the *Garrett* decision, but the opinions simply cannot be reconciled unless they are to be read as establishing separate accrual rules (a) for the commencement of the statute of limitations and (b) for the right to bring the cause of action. But the Alabama Supreme Court has not expressly adopted such a position, and this court should not assume that such an illogical position was intended.

The other relevant cases cited by the defendants are *Hillis v. Rentokil, Inc.*, 596 So.2d 888 (Ala. 1992) and *Becton v. Rhone-Poulenc, Inc.*, 706 So.2d 1134 (Ala. 1997), two opinions that do little more than simply cite *Garrett*.

Standing alone, the three cases cited by the defendants might lead the court to conclude that the law is as the defendants assert, but that would be an erroneous decision, for the defendants have not revealed to this court that there are at least two conflicting lines of cases, that they have conveniently cited the shorter line of cases, and that the ruling sought by the defendants is not only illogical, but it is also manifestly unjust and unconstitutional. Before ruling in favor of the defendants, then, this Court should demand that they specifically list every one of the cases that the defendants contend make up the "eighty years of Alabama jurisprudence" interpreting ALA. CODE § 6-2-30 to include an exposure accrual rule.

In contrast to the defendants, amicus curiae Environmental Litigation Group, P.C. concedes that there are Alabama Supreme Court opinions that support the defendants' position. However, the decisions cited by the defendants did not overrule longstanding precedent to the contrary and, if followed in this case, will yield results violative of both the Alabama and United States constitutions. Attached as **EXHIBIT A** hereto is a draft of an article entitled "Withholding Justice from Toxic Tort Victims," which the author anticipates will be published in the spring 2005 issue of the AMERICAN JOURNAL OF TRIAL ADVOCACY. That article includes a thorough summary of Alabama law concerning the accrual of cases for exposure to toxic substances.

In their brief, the defendants omit to disclose that the Alabama Supreme Court has, for at least a century and a half, consistently declared that a cause of action does not accrue until the plaintiff is first entitled to assert that cause of action, a position that the court even repeated in the *Garrett* decision. This accrual rule can be traced to the ancient civil law maxim *contra non valentem agere nulla currit praescriptio*, literally meaning "no prescription runs against one unable to act," a principle that was adopted by the Alabama Supreme Court in 1851 and that has been continuously followed since that time:

- ***1851***: In *Hopper v. Steele*, 18 Ala. 828 (1851), the Alabama Supreme Court cited the civil law maxim quoted above to reverse a circuit court judgment holding that an action to recover a slave was time-barred because of the lapse of nineteen years. In so ruling, the court observed that the statute of limitations "never begins to run unless there is some one in existence capable of suing." *Id.* at 831.

- ***1909***: In *West Pratt Coal Co. v. Dorman*, 161 Ala. 389, 49 So. 849 (1909), the Alabama Supreme Court declared "In line with the authorities noted above, and the reasons upon which they proceed, we hold that a cause of action accrues to the owner of the upper soil when the failure of support by the underlying strata, through causes put into operation by mining them, interferes with the utility and enjoyment of the superincumbent soil." *Id.* at 393, 851.

- ***1917***: In *Kelly v. Shropshire*, 199 Ala. 602, 75 So. 291 (1917), the court declared that a cause of action accrues at the time of the tortious act only if that act itself constitutes a legal injury, without regard to damages. *Id.* at 604, 292.

- ***1925***: In *Corona Coal Co. v. Hendon*, 213 Ala. 323, 104 So. 799 (1925), the Alabama Supreme Court declared that " . . . time begins to run when the injury happens or damage accrues, and not from the date of the act causing the injury or damage." *Id.* at 325, 801.

- ***1962***: In *Brotherhood of Locomotive Firemen & Enginemen v. Hammett*, 273 Ala. 397, 140 So.2d 832 (1962), *on subsequent appeal*, 273 Ala. 629, 144 So.2d 58 (1962), the Alabama Supreme Court again declared that "the time of limitation begins to run when the injury happens or damage accrues, and not from the date of the act causing the injury or damage." *Id.* at 401, 834.

All of the preceding decisions were decided before *Garrett*, but even after its decision in *Garrett*, the Alabama Supreme Court has continued to apply the principle that a cause of action accrues only after the party in whose favor it arises is entitled to maintain an action thereon. Consider the following cases:

- ***2001***: In *Payton v. Monsanto Co.*, 801 So.2d 829 (Ala. 2001), the court actually cited *Garrett* as controlling "the question when the statute of limitations begins to run when the date of the act differs from the date of the injury." *Id.* at 835. Then, relying on *Garrett*, the court ruled that the owners of waterfront property on Lay Lake that had been contaminated by PCBs released from the Monsanto plant in Anniston had timely filed their claims because the *damages* that resulted from the defendant's wrongful conduct had occurred within the limitations period, even though the wrongful conduct had not.

- ***2001***: In *Ex Parte Floyd*, 796 So.2d 303 (Ala. 2001), the Alabama Supreme Court once again cited *Garrett* for the proposition that an act causing an injury and the injury itself may occur on two separate dates,

and, applying this principle, determined that a lawsuit had been timely filed.

From the foregoing, it appears not only that the Alabama Supreme Court has not abandoned the principle that a cause of action accrues only after the party in whose favor it arises is entitled to maintain an action thereon, but more significantly that the Alabama Supreme Court is now citing *Garrett* for that principle, even though the result in the *Garrett* case was contrary to that principle.

The defendants have admitted that the plaintiff in the instant case was first diagnosed with an actionable disease in October 1999 (Defendants' Brief, p. 2) and that he filed this case less than two years later, on April 6, 2001 (Defendants' Brief, p. 2). Incredibly, the defendants contend that because the plaintiff did not file the case within two years after his last exposure – *even though he was not yet sick at that time* – his case was not timely filed. Perhaps most telling is the fact that in their brief, *the defendants fail to offer any opinion whatsoever about when the plaintiff should – or even could – have filed his lawsuit.* Before ruling in favor of the defendants, this Court should ask the defendants – nay, demand of them – that they advise the court when the plaintiff was permitted under Alabama law to file his lawsuit. Unless the defendants can establish to the court's satisfaction that there was a reasonable time period during which the plaintiff could have filed this case, and that the plaintiff failed to exercise his rights within that time period, then this court should not now deny the plaintiff access to justice. To do so would violate both the Alabama and United States constitutions.

Section 13 of the Alabama Constitution, which is frequently referred to as the "open courts" provision, reads as follows:

> **§ 13. Courts to be open; remedies by due process for injuries; administration of justice**
>
> That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.

The essence of § 13 is that it "preserves the right to a remedy for an injury." *Pickett v. Matthews*, 238 Ala. 542, 545, 192 So. 261, 264 (1939). "This section of the Constitution preserves to all persons a remedy for accrued or vested causes of action." *Mayo v. Rouselle Corp.*, 375 So.2d 449, 451 (Ala. 1979). The origins of § 13 can be traced to the Magna Carta, and the section incorporates "a fundamental principle of fairness." *Lankford v. Sullivan, Long & Haggerty*, 416 So.2d 996, 999 (Ala. 1982), quoting concurring opinion of Justice Shores in *Fireman's Fund American Ins. Co. v. Coleman*, 394 So.2d 334, 350-351 (Ala. 1980). It "guarantees every person shall have his day in court." *Tillman v. Sibbles*, 292 Ala. 355, 357, 294 So.2d 436, 438 (1974). As a consequence, the court has ruled that any legislative action that effectively eliminates a common law cause of action or its enforcement through legal process is automatically suspect under § 13. *Lankford v. Sullivan, Long & Haggerty*, 416 So.2d 996, 1000 (Ala. 1982), quoting concurring opinion of Justice Shores in *Fireman's Fund American Ins. Co. v. Coleman*, 394 So.2d 334, 352 (Ala. 1980).

The Alabama Supreme Court has not hesitated to strike down legislation that effectively bars a cause of action before the plaintiff is entitled to bring the action, including statutes of repose. *Lankford v. Sullivan, Long & Haggerty*, 416 So.2d 996 (Ala. 1982); *Jackson v. Mannesmann Demag Corp.*, 416 So.2d 996 (Ala. 1982). Indeed, the Alabama Supreme Court rejected an argument essentially identical to the argument now advanced by the defendants in this case. In doing so, the court stated "The problem with the defendants' argument is that latent defects in a building caused by the builder may not produce injuries until the seven year period has elapsed." *Jackson v. Mannesmann Demag Corp.*, 435 So.2d 725, 728 (Ala. 1983). Obviously, the same may be said of toxic tort claims.

Denying any opportunity to prosecute a toxic tort claim in Alabama courts violates not only Alabama's open courts guarantee, it also violates the due process clause of the Fourteenth Amendment to the U.S. Constitution. More than one hundred years ago, the U.S. Supreme Court declared:

> It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. *Wilson v. Iseminger*, 185 U.S. 55, 62, 22 S.Ct. 573, 46 L.Ed. 804 (1902).

The Alabama Supreme Court is not only aware of the foregoing declaration, but has even quoted it with approval,

observing that one week would not be a reasonable time within which to bring an action. *Lankford v. Sullivan, Long & Haggerty*, 416 So.2d 996, 1006 (Ala. 1982). If one week is insufficient, then having no time at all within which to file an action must also be insufficient.

A state statute of limitations denies due process under the Fourteenth Amendment to the U.S. Constitution unless it provides for a reasonable opportunity to file a case. "This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect." *Terry v. Anderson*, 95 U.S. 628, 632-633, 24 L.Ed. 365, 366, 5 Otto 628, 632-633 (1877). Procedural restrictions limiting access to the courts – including statutes of limitations – are valid only if they do not violate the Fourteenth Amendment requirement that such access be provided at a meaningful time and manner. *Logan v. Zimmerman*.455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

The U.S. Supreme Court has further specifically rejected the notion that a statute of limitations in a toxic tort case can accrue and run long before there is any manifest injury. In *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949), the court ruled that if it were to interpret the FELA statute of limitations as having accrued on exposure in a silicosis case, that interpretation would transform the FELA into a "delusive remedy." *Id.* at 169-170, 1024-1025, 1292.

CONCLUSION

This court has a number of duties, including both the duty to comply with the law and to respect higher authority,

the duty to dispense justice, and the duty to be fair. But where there are conflicting authorities, the court will be unable to adhere to them all, and it is in just such cases that the court must carefully consider what will be just and fair. In the instant case, the court must decide whether it will follow a line of cases that began with the 1979 decision in *Garrett v. Raytheon Co.*, or the much older line of cases that began with the 1851 decision in *Hopper v. Steele*. In order to follow the *Garrett* decision, the court must ignore both § 13 of the Alabama Constitution and the Due Process clause set forth in the Fourteenth Amendment to the United States Constitution. But if the court instead follows the *Hopper* decision, it can also honor and comply with those constitutional provisions. If the court decides to follow the *Garrett* decision, it will be declaring to the plaintiff and to all of the citizens of Jefferson County that it is just, it is fair, to deny toxic tort victims any opportunity whatsoever to file a lawsuit to recover compensation for their injuries. But if the court follows the *Hopper* decision, it will instead be declaring that justice and fairness are important to the court.

In stark contrast to the defendants, amicus curiae Environmental Litigation Group, P.C. urges this court to follow the older, sounder precedent, to comply with the Alabama and United States constitutions, and to render a decision that is both just and fair.

WHEREFORE, PREMISES CONSIDERED, Environmental Litigation Group, P.C. prays that this Honorable Court will enter an order denying *Motion for Summary Judgment of Defendants Ashland, Inc., Chevron Phillips Chemical LP, Successor in Interest to Chevron Chemical Company, LLC, and Exxon Mobil Corporation.*

Respectfully submitted on this the _____ day of February, 2005.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have, on this the ___ day of February, 2005, caused the above and foregoing **Amicus Curiae Brief of Environmental Litigation Group, P.C. in Response to Defendants' Motion for Summary Judgment** to be served on all counsel of record by United States mail, first class postage prepaid, addressed as indicated on the attached listing of counsel.

OF COUNSEL

NO. 1041076

IN THE SUPREME COURT OF ALABAMA

JACK CLINE,

Appellant,

vs.

ASHLAND, INC., et al.,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT FOR FOR [sic] THE TENTH JUDICIAL CIRCUIT JEFFERSON COUNTY, ALABAMA

BRIEF OF THE APPELLANT

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ORAL ARGUMENT REQUESTED

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* * *

Part C.

The Trial Court's Ruling Denied the Appellant Due Process of Law

It is undisputed that Mr. Cline was first diagnosed with an actionable disease in October 1999 (C. 465) and that he filed this case less than two years later, on April 6,

2001 (C. 1-8). Thus, by ruling that Mr. Cline's action was not timely filed as against the defendants, the trial court has effectively ruled that Mr. Cline was required to file his case before he had a manifest present injury, contrary to this Court's rulings in *Thomas* and *Hinton*.

Before affirming the trial court, this Court should ask itself just when Mr. Cline was permitted under Alabama law to file his lawsuit against the defendants. Unless this Court is satisfied that the trial court's ruling left a reasonable time period during which Mr. Cline could have filed this case, and that Mr. Cline failed to exercise his rights within that time period, then this Court should not now uphold the trial court's ruling and deny Mr. Cline access to justice. To do so would violate both the Alabama and United States Constitutions.

The "open courts" provision of our state constitution, *Ala. Const. Of 1901*, art. I, § 13, reads as follows:

> **§ 13. Courts to be open; remedies by due process for injuries; administration of justice**
>
> That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.

The origins of this section can be traced to the Magna Carta, and the section incorporates "a fundamental principle of fairness." *Lankford v. Sullivan, Long & Haggerty*, 416 So.2d 996, 999 (Ala. 1982), quoting concurring opinion of Justice Shores in *Fireman's Fund American Ins. Co. v. Coleman*, 394 So.2d 334, 351 (Ala. 1980). The essence of § 13 is that it "preserves the right to a remedy for an

injury." *Pickett v. Matthews*, 192 So. 261, 263 (Ala. 1939), overruled on other grounds.[25] "This section of the Constitution preserves to all persons a remedy for accrued or vested causes of action." *Mayo v. Rouselle Corp.*, 375 So.2d 449, 451 (Ala. 1979). It "guarantees every person shall have his day in court." *Tillman v. Sibbles*, 294 So.2d 436, 438 (Ala. 1974).

But this Court's decisions in *Garrett*, *Tyson*, *Thomas*, and *Hinton*, when construed together, make a mockery of § 13 and the cases interpreting that section. Under the scheme established by those opinions, the plaintiff's cause of action is deemed, under *Garrett* and *Tyson*, to have "accrued" upon his exposure to benzene, but he was not permitted, under *Thomas* and *Hinton*, to assert that cause of action until he developed a "manifest present injury." In effect, Mr. Cline was not permitted to assert an "*accrued*" cause of action until it was deemed to be untimely. Surely this Court must see that taken together, its own rulings

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[25] Although Shepard's indicates that *Pickett* was overruled by *Jackson v. Mannesmann Demag Corp.*, 435 So. 2d 725, 727 (Ala. 1983), that case simply expanded the protection afforded by *Ala. Const. Of 1901* art. I, § 13:

> Appellees first argue that when we spoke of depriving one of a cause of action we were referring to a vested or accrued cause of action. They go on to argue that § 13 guarantees extend only to vested causes of action. The defendants would have us equate § 13 with the due process clause. While there is authority in Alabama for that position, e.g., *Pickett v. Matthews, 238 Ala. 542, 192 So. 261 (1939)*, we refused to adopt that construction in *Lankford*.

Jackson v. Mannesmann Demag Corp., 435 So. 2d 725, 727 (Ala. 1983).

Thus, even assuming, *arguendo*, that Mr. Cline's claim is not vested or accrued (as this Court in *Garrett* and *Tyson* says that it has), his rights under § 13 have nevertheless been denied under the foregoing rationale.

violate this fundamental principle of fairness and denied Mr. Cline any remedy, any access to the courts, for his "*accrued*" cause of action against the defendants.

This Court has ruled that any legislative action that effectively eliminates a common law cause of action or its enforcement through legal process is automatically suspect under § 13. *Lankford v. Sullivan, Long & Haggerty*, 416 So.2d 996, 1000 (Ala. 1982), quoting concurring opinion of Justice Shores in *Fireman's Fund American Ins. Co. v. Coleman*, 394 So.2d 334, 352 (Ala. 1980). Consequently, this Court has not hesitated to strike down legislation that effectively bars such a cause of action before the plaintiff is entitled to bring the action. *Lankford v. Sullivan, Long & Haggerty*, 416 So.2d 996, 1004 (Ala. 1982); *Jackson v. Mannesmann Demag Corp.*, 435 So.2d 725 (Ala. 1982).

And the fact that Mr. Cline's action against the defendants' joint tortfeasors was not barred is irrelevant. Indeed, this Court has rejected an argument essentially identical to the argument now advanced by the defendants in this case:

> The problem with the defendants' argument is that latent defects in a building caused by the builder may not produce injuries until the seven year period has elapsed. The fact that an injured plaintiff would still have a cause of action against the owner of the building is not sufficient to justify insulating the builder from all liability.

Jackson v. Mannesmann Demag Corp., 435 So.2d 725, 728 (Ala. 1983).

Through its creation of an exposure-based limitations accrual rule in toxic tort cases, this Court has done something that it says the Legislature cannot do. Under

Lankford and *Jackson*, the Court would presumably strike down any legislative scheme by which the vast majority of toxic tort claims were deemed to have accrued for statute of limitations purposes long before the plaintiffs were entitled to bring suit. Indeed, the Court would undoubtedly chastise the Legislature for denying the plaintiffs any access to the courts and, in effect, thereby abolishing a common law cause of action.

But this Court has done precisely what it says the Legislature cannot do. Rights that are secure against but one branch of government are not secure at all. Moreover, there is nothing in the language of § 13 to suggest that it applies only to legislative action. The section appears under Article I, "Declaration of Rights," not under Article IV, "Legislative Department." Indeed, this Court has acknowledged that it, too, is bound by § 13:

> The various rights vested in our citizens by the State and Federal Constitutions require that the Judiciary have adequate and reasonable resources available for it to serve as the forum for the enforcement of those rights. Moreover, the Alabama Constitution specifically requires the courts to be open and to be the avenue through which every person in this State may seek a remedy for an injury. *Ala. Const.* art. I, § 13. The constitutional duty of the courts in this State is that they be available for the delivery of justice, and they are constitutionally required to deliver justice with due process of law. Absent adequate and reasonable judicial resources, the people of our State are denied their constitutional rights.

Folsom v. Wynn, 631 So.2d 890, 898-899 (Ala. 1993).

Thus, as interpreted, § 13 precludes not only legislative acts that restrict access to the courts, but *any* such action, including action taken by this Court. Clearly, then, the Court's decisions in *Garrett*, *Tyson*, *Thomas*, and *Hinton* – construed together – violate this fundamental constitutional right.

Denying any opportunity to prosecute a toxic tort claim in Alabama courts violates not only Alabama's open courts guarantee, it also violates the due process guarantees of the U.S. Constitution. In one of the most famous opinions ever penned, Chief Justice John Marshal observed:

> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

One century later, and more than one hundred years ago, the U.S. Supreme Court declared:

> It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions.

Wilson v. Iseminger, 185 U.S. 55, 62 (1902).

This Court is not only aware of the foregoing declaration, but has even quoted it with approval, observing that one week would not be a reasonable time within which to bring an action. *Lankford v. Sullivan, Long & Haggerty*, 416 So.2d 996, 1006 (Ala. 1982), Torbert, C.J., concurring specially. If one week is insufficient, then having no time at all within which to file an action must also be insufficient.

A state statute of limitations denies due process under the Fourteenth Amendment to the U.S. Constitution unless it provides for a reasonable opportunity to file a case:

> This Court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect.

Terry v. Anderson, 95 U.S. 628, 632-633 (1877).

Procedural restrictions limiting access to the courts – including statutes of limitations – are valid only if they do not violate the Fourteenth Amendment requirement that such access be provided at a meaningful time and manner. *Logan v. Zimmerman*, 455 U.S. 422, 437 (1982).

The U.S. Supreme Court has further specifically rejected the notion that a statute of limitations in a toxic tort case can accrue and run long before there is any manifest present injury. In *Urie v. Thompson*, 337 U.S. 163 (1949), the Court ruled that if it were to interpret the FELA statute of limitations as having accrued on exposure in a silicosis case, that interpretation would transform the FELA into a "delusive remedy" inconsistent with the "traditional purposes" of statutes of limitations:

> If Urie were held barred from prosecuting this action because he must be said, as a matter of law, to have contracted silicosis prior to November 25, 1938, it would be clear that the federal legislation afforded Urie only a delusive remedy. It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability.
>
> . . .
>
> We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights.

Id. at 169-170.

This Court's rulings in *Garrett* and *Tyson*, when construed together with *Thomas* and *Hinton*, effectively transmogrified Mr. Cline's claims against the defendants into a "delusive remedy" and thereby denied Mr. Cline his due process rights under both the Alabama and United States Constitutions.

CONCLUSION

The summary judgment granted by the trial court in favor of the defendants and against Mr. Cline is due to be reversed for several reasons.

First, under Alabama law the right of action against joint tortfeasors is one and indivisible and the statute of limitations could not have accrued on Mr. Cline's single claim as against any one of the joint tortfeasors until every action that contributed to Mr. Cline's injuries had occurred. Thus, even if an exposure accrual rule applies to this case, Mr. Cline's suit was timely filed against all joint tortfeasors, including the defendants, because he continued to be exposed to benzene until a date well within two years prior to the filing of the action.

Second, an exposure accrual rule is inconsistent with 154 years of Alabama jurisprudence. This Court has consistently declared that a cause of action does not accrue until the plaintiff is first entitled to assert that cause of action. *Thomas* and *Hinton* cannot be reconciled with this Court's earlier opinions in *Garrett* and *Tyson* unless the four cases are to be read as establishing separate accrual rules (a) for the commencement of the statute of limitations and (b) for the right to bring the cause of action. This Court could not have intended such a bizarre result, and it must therefore be concluded that this Court's decisions in *Thomas* and *Hinton*, by ruling that a toxic tort claim does not accrue until a plaintiff has a manifest present injury, implicitly overruled *Garrett* and *Tyson*.

Finally, it is undisputed that Mr. Cline filed this case less than two years after he was diagnosed with acute myelogenous leukemia. Thus, by ruling that Mr. Cline's action was not timely filed as against the defendants, the

trial court has effectively ruled that Mr. Cline was required to file his case before he had a manifest present injury and was permitted by law to file it under *Thomas* and *Hinton*. The trial court's ruling therefore denied Mr. Cline due process of law under both the Alabama and United States Constitutions.

For the foregoing reasons, Mr. Cline respectfully prays that this Court reverse the summary judgment granted by the trial court and remand this case for further proceedings.

Oral argument is requested in this case.

Respectfully submitted on this the 21st day of July, 2005.

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SUPREME COURT CASE NO. 1041076

IN THE SUPREME COURT OF ALABAMA

Jack Cline

Appellant

v.

Ashland, Inc., Chevron Phillips Chemical LP, successor in interest to Chevron Chemical Company, LLC, and ExxonMobil Corporation

Appellees

APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA, BESSEMER DIVISION CV-2003-1429

BRIEF OF APPELLEES

Ashland, Inc., Chevron Phillips Chemical LP, successor in interest to Chevron Chemical Company, LLC, and ExxonMobil Corporation

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ORAL ARGUMENT REQUESTED

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D. The trial court's decision on summary judgment did not deny plaintiff due process of law.

Plaintiff's due process argument at pages 46 through 55 of his brief is misguided and incorrect, because it misconceives the bases of this Court's decisions in *Thomas* and *Hinton*. In doing so, plaintiff blurs the distinction between those cases in which the Court has found that an injury occurs at the time of exposure, such as *Garrett,* and those cases in which the Court has found that a period of time passed between the claimed misconduct and the damage that it produced, such as *Payton v. Monsanto,* 801 So. 2d 829 (Ala. 2001), and *Smith v. Medtronic, Inc.,* 607 So. 2d 156 (Ala. 1992). Since the Court in *Garrett* clearly distinguished those types of cases, the due process argument should not occupy this Court for long.

Plaintiff asks the Court to ask itself "just when Mr. Cline was permitted under Alabama law to file his lawsuit against the defendant." (Appellant's Brief at 46). The answer is simple – he was entitled to sue these defendants for his exposures to benzene at Griffin Wheel from the first day he was exposed to benzene there to any time up to and including the day two years after he was last exposed there to benzene supplied by these defendants. *See Garrett, Becton, and Hillis, supra.* Since plaintiff had a remedy by due process of law, he cannot legitimately claim a violation of Section 13 of the *Alabama Constitution.*

Contrary to plaintiff's argument, he has not been denied any opportunity to prosecute a toxic tort claim in Alabama courts. Rather, he has been required to file that claim within two years of the date on which he was last exposed to defendants' product. This is the same rule that applies to every other toxic tort claimant; indeed, it is

essentially the same rule that applies to almost all personal injury claimants in Alabama.

Plaintiff's due process arguments are based upon the same misconception of *Thomas* and *Hinton* that permeated his argument for overturning *Garrett*. Because of that misconception, and because it is uncontroverted that plaintiff had a right to pursue a toxic tort claim against these defendants that he allowed to expire unused in 1989, the constitutional argument is due to be rejected.

* * *

CONCLUSION

For any or all of the foregoing reasons, the trial court's order granting summary judgment in defendants' favor should be affirmed.

Respectfully submitted,

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NO. 1041076

IN THE SUPREME COURT OF ALABAMA

JACK CLINE,

Appellant,

vs.

ASHLAND, INC., CHEVRON PHILLIPS CHEMICAL LP, successor in interest to Chevron Chemical Company, LLC, and EXXONMOBIL CORPORATION,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT FOR FOR THE TENTH JUDICIAL CIRCUIT JEFFERSON COUNTY, ALABAMA

APPLICATION FOR REHEARING

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ORAL ARGUMENT REQUESTED

APPLICATION FOR REHEARING

WHY THE APPLICATION SHOULD BE GRANTED: CHARACTER AND RESPECT FOR THE RULE OF LAW

The Chief Justice of this Court has recently published a book about character, and he has made a number of speeches throughout the state touting the importance of character and the rule of law. He has even stated that he hopes that when he retires from the bench, "people will judge him based on his character," and that without character, "you can kiss the rule of law goodbye."[1] Indeed, according [sic] the Chief Justice, "political freedom ultimately depends on the character of the nation."[2] At the Republican Party's website he states unequivocally "that judges are to interpret and fairly apply the law, not make it."[3]

Every decision made by this Court reflects on its character and integrity. When the Court issues a per curiam decision affirming without opinion the ruling of a trial court, it should do so very carefully and only in compliance with the Court's own rules, for a failure to address substantive issues with which the Court has been presented can reflect on its character and integrity. This case is just such a case because it was affirmed without opinion contrary to this Court's own rules, after which the Court failed to notify the parties of its decision.

Affirmance without opinion is reserved for cases in which there is no conflict in authority and no constitutional

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[1] Chief Justice Nabers for Supreme Court; "In the News," http:/ www/draytonnabers.com/news.asp?record_no=5107.

[2] "Nation's character key to freedom, Nabers says," *The Huntsville Times*, Sunday, May 22, 2005.

[3] Nabers Announces Campaign for Chief Justice, Judges Across State Endorse Candidacy," Thursday, September 22, 2005, http:/www. algop.org/News/Read.aspx?ID=135.

issue to consider. Indeed, the Committee Comment to *Ala.R.App.P.* 53 explains that affirmance without opinion is proper only in those cases:

> . . . wherein the affirmance does not call for the court to establish a new principle of law; *to construe a provision of a constitution, statute, ordinance, or court rule*; to alter or modify an existing principle of law or to extend it to a new factual context; to reaffirm a principle not applied in a recently reported opinion; to decide an issue of general or continuing public interest; or to *resolve a conflict or apparent conflict of authority*. (emphasis added).

In this case the Court has been squarely presented not only with constitutional issues not previously addressed by this Court, but also with a conflict in its own rulings. Thus, under Rule 53, affirmance without opinion is inappropriate.

Under the existing rulings of this Court, many toxic tort victims in Alabama – like the Appellant, Mr. Cline – find that they are denied access to the courts and have no remedy for their already accrued causes of action. And so Mr. Cline has appealed his case to this Court, asking only that the Court carefully consider the conflict between its prior rulings and then rule in Mr. Cline's case, telling him just when he was entitled under those prior rulings to bring his accrued cause of action. Unfortunately, this Court has instead declined to address this important issue and has even declined to issue a written opinion explaining just how its apparently conflicting decisions should be understood.

COURT-CREATED INJUSTICE

That the issue in this appeal concerns a court-created injustice should be very clear. There is ***no legislative act*** mandating that the statute of limitations in a toxic tort case

commence on exposure, regardless of disease, and there is similarly ***no legislative act*** mandating separate accrual rules (a) for the statute of limitations in a toxic tort case and (b) for the right to bring such a toxic tort case. ***It is this Court that has created the two distinct accrual rules.***

First, it was this Court that ruled, in *Garrett v. Raytheon Co., Inc.*, 368 So.2d 516 (Ala. 1979), that the "injury" in a toxic tort case occurs on exposure, regardless of disease, and ***second, it was this Court that ruled***, in *Hinton v. Monsanto Co.*, 813 So.2d 827 (Ala. 2001), that a toxic tort claim does not accrue until the victim has a "manifest, present injury."

Thus, ***it is this Court that has effectively created a rule*** that bars most toxic tort victims from ever having their day in court by requiring them to file their lawsuits long before they are ever entitled to do so.

This Court-created law denies countless Alabama citizens due process of law in violation of the Constitutions of the United States of America and the State of Alabama. ***Respect for the rule of law, therefore, demands that this Court correct this terrible injustice***. And yet this Court has elected instead to affirm the trial court decision without granting oral argument and without writing an opinion explaining just how *Garrett* and *Hinton* are to be construed together without denying due process of law.

If the rule of law is important to this Court, then it should consider the words of the nation's first Chief Justice, John Marshall:

> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, *if the laws furnish no remedy for the violation of a vested legal right.*

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803), emphasis added. At its core this case concerns decisions of this Court that collectively deny toxic tort victims any remedy for the violation of vested legal rights.

It doesn't take character to avoid difficult issues by affirming an unjust decision without explaining in an opinion the reasons for the affirmance. It does take character to confront a difficult issue head on and admit that the Court's prior rulings were in error, thereby restoring the rule of law and insuring that the law furnishes a remedy for every vested legal right.

Jack Cline, a man dying from leukemia, asks only that this Court confront the issue placed before it and restore the rule of law.

STATEMENT OF THE FACTS

The essential facts in this case are not in dispute.[4] Mr. Cline was exposed to benzene over the course of many years, including exposure to pure benzene manufactured and/or supplied by the defendants, Ashland, Inc., Chevron Phillips Chemical LP, and Exxon Mobil Corporation (C.

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[4] The defendants' summary of the facts is set forth in their August 28, 2002 "Narrative Summary of Undisputed Material Facts and Brief in Support of Motion for Summary Judgment on Behalf of Defendants Ashland, Inc., Chevron Phillips Chemical LP, Successor in Interest to Chevron Chemical Company, LLC, and Exxon Mobil Corporation" (C. 421-433 at 422-424) and their January 8, 2004 "Narrative Summary of Undisputed Material Facts and Brief in Support of Motion for Summary Judgment on Behalf of Defendants Ashland, Inc., Chevron Phillips Chemical LP, Successor in Interest to Chevron Chemical Company, LLC, and Exxon Mobil Corporation" (C. 786-832 at 787-796). The trial court's summary of the facts is set forth in its March 8, 2005 "Order on Motion for Summary Judgment" (C. 2459-2461).

467-506 at 497; C. 520-549 at 525-529;[5] C. 1759-1886 at 1777). Mr. Cline's exposure to benzene manufactured and/or supplied by the defendants occurred while he was employed as a plant chemist for Griffin Wheel Company in Bessemer from about 1968 through about 1987 (C. 520-549 at 525-529;[6] C. 1759-1886 at 1784-1786).

However, from approximately 1969 until October 7, 1999,[7] Mr. Cline also used a product known as "Thompson's Water Seal" (C. 520-549 at 526;[8] C. 613-625 at 614), which contained benzene (C. 622-625 at 623) and was manufactured and/or supplied by Thompson & Formby Company, a former defendant in the case (C. 1-8 at 2). Thus, Mr. Cline was continuously exposed to benzene from all joint tortfeasors throughout the period from approximately 1968 until October 7, 1999.

On October 7, 1999, oncologist Dr. Melissa Baird diagnosed Mr. Cline with acute myelogenous leukemia (C. 465) and told him that his disease was caused by his continuous exposure to benzene over the course of many years (C. 438-455 at 445[9] and at 450-451;[10] C. 456-506 at 458[11] and at 459[12]). On April 6, 2001, less than two years after both Mr. Cline's last exposure to benzene and his

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[5] Response to interrogatory no. 6.

[6] Response to interrogatory no. 6.

[7] Mr. Cline testified that his exposure to Thompson's Water Seal continued until his diagnosis on October 7, 1999 with acute myelogenous leukemia: "... the first part of '99 and all before I came down with my cancer." (C. 613-625 at 614).

[8] Response to interrogatory no. 6(e)(iv).

[9] Interrogatory no. 11.

[10] Interrogatory no. 23.

[11] Response to interrogatory no. 11.

[12] Response to interrogatory no. 23.

diagnosis with acute myelogenous leukemia (and therefore less than two years after he first had a manifest, present injury for which a lawsuit could be brought), Mr. Cline filed this AEMLD personal injury action against the defendants and others (C. 1-8). Included among the defendants Mr. Cline sued was Thompson & Formby Company, through whose product Mr. Cline's exposure to benzene continued through 1999.

On March 8, 2005, Circuit Court Judge Dan C. King, III (Tenth Judicial Circuit, Jefferson County, Bessemer Division) granted the defendants' motion for summary judgment (C. 2459-2461), ruling that Mr. Cline's claims against the joint tortfeasors did not accrue on the same date but rather on separate and distinct dates for each joint tortfeasor.

CONCLUSION

There can be no doubt that under the trial court's ruling, there was never a time when Mr. Cline could have "timely" filed his cause of action. Relying on *Garrett*, the trial court determined that Mr. Cline's cause of action accrued in 1987, upon his last exposure to the defendants' benzene. But if Mr. Cline had sued the defendants within the two years immediately following that last exposure, his case undoubtedly would have been dismissed under *Hinton*, for he had no "manifest present injury" until 1999, when he was diagnosed with acute myelogenous leukemia. Thus, ***under this Court's conflicting prior decisions, there never was a time when Mr. Cline was permitted to bring his case against the defendants***.

This Court is the guardian of the laws and liberties of the people of Alabama. If the Court is truly interested in

preserving the rule of law, then it should take this opportunity to correct its own error and reverse a terrible injustice.

Jack Cline prays that this Court will do so.

Respectfully submitted on this the 9th day of November, 2005.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have, on this the ___day of November, 2005, caused the above and foregoing **Application for Rehearing** to be served on counsel of record by United States mail, first class postage prepaid, addressed as follows:

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NO. 1041076

IN THE SUPREME COURT OF ALABAMA

JACK CLINE,

Appellant,

vs.

ASHLAND, INC., CHEVRON PHILLIPS CHEMICAL LP, successor in interest to Chevron Chemical Company, LLC, and EXXONMOBIL CORPORATION,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT FOR FOR THE TENTH JUDICIAL CIRCUIT JEFFERSON COUNTY, ALABAMA

BRIEF OF THE APPELLANT ON REHEARING

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ORAL ARGUMENT REQUESTED

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Denying any opportunity to prosecute a toxic tort claim in Alabama courts violates not only Alabama's open courts guarantee, it also violates the due process guarantees of the U.S. Constitution. In one of the most famous opinions ever penned, Chief Justice John Marshal observed:

> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

One century later, and more than one hundred years ago, the U.S. Supreme Court declared:

> It may be properly conceded that all statutes of limitation must proceed on the idea that the

> party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions.

Wilson v. Iseminger, 185 U.S. 55, 62 (1902).

This Court is not only aware of the foregoing declaration, but has even quoted it with approval, observing that one week would not be a reasonable time within which to bring an action. *Lankford v. Sullivan, Long & Haggerty*, 416 So.2d 996, 1006 (Ala. 1982), Torbert, C.J., concurring specially. If one week is insufficient, then having no time at all within which to file an action must also be insufficient.

A state statute of limitations denies due process under the Fourteenth Amendment to the U.S. Constitution unless it provides for a reasonable opportunity to file a case. *Terry v. Anderson*, 95 U.S. 628, 632-633 (1877). Procedural restrictions limiting access to the courts – including statutes of limitations – are valid only if they do not violate the Fourteenth Amendment requirement that such access be provided at a meaningful time and manner. *Logan v. Zimmerman*, 455 U.S. 422, 437 (1982).

The U.S. Supreme Court has further specifically rejected the notion that a statute of limitations in a toxic tort case can accrue and run long before there is any manifest present injury. *Urie v. Thompson*, 337 U.S. 163 (1949). Otherwise, the plaintiff would be afforded only a "delusive remedy" inconsistent with the "traditional purposes" of statutes of limitations. *Id.* at 169-170.

This Court's rulings in *Garrett* and *Tyson*, when construed together with *Thomas* and *Hinton*, effectively transmogrified Mr. Cline's claims against the defendants into a "delusive remedy" and thereby denied Mr. Cline his due process rights under both the Alabama and United States Constitutions.

CONCLUSION

The summary judgment granted by the trial court in favor of the defendants and against Mr. Cline is due to be reversed, for it is founded on inconsistent case law through which Mr. Cline has been denied any remedy for his injury and any access to the courts of this state.

Mr. Cline respectfully prays that this Court will reverse the summary judgment granted by the trial court and remand this case for further proceedings.

Oral argument is requested in this case.

Respectfully submitted on this the 9th day of November 2005.

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CASE NO. 1041076

IN THE SUPREME COURT OF ALABAMA

Jack Cline

Appellant

v.

Ashland, Inc., Chevron Phillips Chemical LP, successor in interest to Chevron Chemical Company, LLC, and ExxonMobile Corporation

Appellees

APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA, BESSEMER DIVISION
CV-2003-1429

APPELLEES' BRIEF IN OPPOSITION TO APPLICATION FOR REHEARING

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ARGUMENT AND AUTHORITIES

Plaintiff/Appellant Jack Cline ("Cline") has applied for rehearing of this Court's October 14, 2005 order, issued without opinion, affirming the summary judgment entered against Cline and in favor of the Defendants on Cline's AEMLD claim. Cline fails to identify any points of law or facts overlooked or misapprehended by this Court, and instead, he merely repeats the same arguments rejected by the Circuit Court Judge and by this Court on appeal. Defendants, however, are confident that this Court carefully reviewed the record before it and all applicable legal authorities, and that there is no need or basis to reconsider or reverse this Court's decision.

I. Cline Has Failed to Allege, Much Less Establish, the Threshold Requirement for Rehearing.

The threshold for seeking an application for rehearing is whether the Court "overlooked or misapprehended" the law or the facts. *Ala. R. App. P.* 40(b).[1] Cline's application does not even acknowledge the threshold established by Rule 40, but rather complains about the ultimate result of the opinion, which is not a basis for rehearing. A party's dissatisfaction with the Court's opinion does not warrant a rehearing of a matter pursuant to Rule 40. An application for rehearing should not be the proverbial second bite of

[1] Of course, the mere allegation that law or facts were overlooked or misapprehended – which did not occur here – does not itself justify the grant of a rehearing. Rehearings should be granted only where the Court's overlooking or misapprehension of law or facts leads to manifest error in the court's original opinion which should be corrected. 5 C.J.S. *Appeal and Error* § 678 (1993).

the apple, absent some showing that the Court ignored or misunderstood the facts or law. *See Ala. R. App. P.* 40.

Because Appellant has not pointed to any facts or law that the Court has overlooked or misapprehended, his application for rehearing should be summarily denied.

II. Rehearing is Unwarranted Because This Court Correctly Affirmed the Judgment Below.

Rehearing should also be rejected in this case because a thorough review of the record supports this Court's affirmance of the summary judgment entered in favor of the Defendants. Indeed, the record is replete with evidence from which the Circuit Court and this Court could properly find that the statute of limitations had run on Cline's AEMLD claim and that Cline also failed to support each of the elements of his claim with substantial evidence sufficient to defeat a well-supported summary judgment motion. Moreover, the legal authorities set forth in Defendants' initial appellate brief are sound and demonstrate that summary judgment was properly affirmed on all grounds.

Cline asks this Court on rehearing, just as he did in his original briefs, to overrule *Garrett v. Raytheon Company, Inc.*, 368 So. 2d 516 (Ala. 1979). On multiple occasions, this Court has been asked to or has had the opportunity to overturn *Garrett*, and yet for 26 years it has found no basis to do so. *See Brief of Appellees*, at 32-33. Cline's argument in this case is not a novel one and there is nothing new in his application for rehearing to recommend such a course to a Court which has so often rejected it in the past.

Additionally, Cline's suggestion that Garrett is inconsistent with this Court's more recent decisions in *Thomas v. BSE Industrial Contractors, Inc.*, 624 So. 2d 1041 (Ala. 1993), and *Hinton v. Monsanto Co.*, 813 So. 2d 827 (Ala. 2001), is absolutely incorrect. *See Brief of Appellees*, pp. 35-37. *Garrett* is not inconsistent or incompatible with this Court's more recent jurisprudence, and since Cline has not offered any compelling reason to set it aside, other than the argument that it is unfair, this Court should once again reject the invitation to set aside or overturn *Garrett*.

Just as he did in his original briefs, Cline asks this Court again on rehearing to ask itself "just when Mr. Cline was permitted under Alabama law to file his lawsuit against the Defendants." *Cf. Appellant's Brief*, at 46 with *Brief of the Appellant on Rehearing*, at 9. As previously explained by Defendants, the answer is simple – Mr. Cline was entitled to sue these Defendants for his exposure to benzene at Griffin Wheel from the first day he was exposed to benzene there to any time up to and including the day two years after he was last exposed there to benzene supplied by these Defendants. Because Cline had a remedy by due process of law, he cannot legitimately claim a violation of Section 13 of the Alabama Constitution.

Finally, Cline's application fails to consider that this Court's affirmance of the summary judgment may have been based on Cline's failure to offer substantial evidence to support the elements of his AEMLD claim, which was a separate and additional basis entitling the Defendants to summary judgment on Cline's claims. Indeed, as demonstrated in the Defendants' original brief, Plaintiff failed to produce substantial evidence of at least three critical elements: (1) Cline did not offer substantial evidence that he experienced any substantial exposure to benzene

supplied by any of these Defendants; (2) Cline failed to offer any evidence that any of these Defendants manufactured, sold, or supplied a product in a defective or unreasonably dangerous condition; and (3) Plaintiff failed to offer substantial evidence of both general causation and specific causation. *See Brief of Appellees,* at 44-67.

For any of these reasons, summary judgment was properly affirmed in favor of Defendants and rehearing is both unnecessary and unwarranted.

CONCLUSION

This Court correctly affirmed the judgment in favor of Defendants. There was ample and substantial evidence and well-settled legal authority for the trial court to enter summary judgment in favor of the Defendants and for this Court to affirm that judgment. The application for rehearing should be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF ALABAMA
April 11, 2006

1041076

Jack Cline v. Ashland, Inc., et al. (Appeal from Bessemer Division of Jefferson Circuit Court: CV-01-423).

NOTICE

The above-styled cause having been orally argued before this Court on April 4, 2006, the following associations are invited to file with this Court, within 30 days of the date of this notice, an amicus curiae brief: The Alabama Trial Lawyers Association and The Business Council of Alabama.

The parties to this cause are invited to file written responses to any amicus curiae brief filed. Such response shall be filed with this Court within 15 days of the filing of the amicus curiae brief.

/s/ Robert G. Esdale
Robert G. Esdale, Clerk

c: Gregory Cade, Esq.
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NO. 1041076

IN THE SUPREME COURT OF ALABAMA

JACK CLINE,

Appellant,

vs.

ASHLAND, INC., CHEVRON PHILLIPS CHEMICAL LP, successor in interest to Chevron Chemical Company, LLC, and EXXONMOBIL CORPORATION,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT FOR FOR THE TENTH JUDICIAL CIRCUIT JEFFERSON COUNTY, ALABAMA

MOTION TO SUBSTITUTE EXECUTRIX FOR DECEASED APPELLANT

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ORAL ARGUMENT REQUESTED

MOTION TO SUBSTITUTE EXECUTRIX FOR DECEASED APPELLANT

COMES NOW Martha Jane Cline, the widow and executrix of the estate of Jackie Edward Cline, and, pursuant to *Ala.R.App.P.* 43(c), moves this Honorable Court to substitute her as the Plaintiff and Appellant in this case for the purpose of filing a petition for writ of certiorari with the Supreme Court of the United States. In support hereof, the said Martha Jane Cline states as follows:

In the early morning hours of January 17, 2007, the Plaintiff and Appellant, Jack Cline, died.

On about January 24, 2007, the Appellees filed and served a *Suggestion of Death* notifying this Court of the Appellant's death.

On February 21, 2007, the Appellant's widow, Martha Jane Cline, was appointed executrix of his estate. A copy of the Letters Testamentary is attached hereto.

Mrs. Cline intends to file a petition for writ of certiorari with the Supreme Court of the United States. The deadline for filing that petition is April 5, 2007.

For the foregoing reasons, Martha Jane Cline respectfully prays that this Honorable Court will enter its Order substituting her as the Plaintiff and Appellant in this case.

Respectfully submitted on this the 22nd day of February 2007.

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IN THE SUPREME COURT OF ALABAMA
March 9, 2007

1041076

Jack Cline v. Ashland, Inc., et al. (Appeal from Bessemer Division of Jefferson Circuit Court: CV-01-423).

ORDER

Counsel for the appellant having filed a "Motion to Recall Certificate of Judgment and to Substitute Executrix for Deceased Appellant,"

IT IS ORDERED that the Certificate of Judgment issued on February 7, 2007, is withdrawn for the limited purpose of substituting the executrix of the estate of Jack Cline as the appellant in the above-referenced cause.

IT IS FURTHER ORDERED that Martha Jane Cline, executrix of the estate of Jack Cline, deceased, is substituted as the appellant in the above-referenced cause. Hereafter, the style of this cause shall be Martha Jane Cline, executrix of the estate of Jack Cline, deceased v. Ashland, Inc., et al.

Done this the 9th day of March 2007.

/s/ Robert G. Esdale, Sr.
Robert G. Esdale, Sr.
Clerk

Appendix
Accrual Rules in Other Jurisdictions

***Alaska*:** "Under the discovery rule, a plaintiff's claim accrues at the time that he discovers, or reasonably should discover, all of the elements of his cause of action." *Sopko v. Dowell Schlumberger, Inc.*, 21 P.3d 1265, 1271 (Ak. 2001).

***Arizona*:** "Arizona follows the 'discovery rule' as far as the statute of limitations for personal injuries is concerned." *Burns v. Jaquays Mining Corp.*, 156 Ariz. 375, 378, 752 P.2d 28, 31 (Ariz. Ct. App. 1987).

***Arkansas*:** "We hold that in product liability cases, the statute of limitations under § 16-116-103 does not commence running until the plaintiff knew or, by the exercise of reasonable diligence, should have discovered the causal connection between the product and the injuries suffered." *Martin v. Arthur,* 339 Ark. 149, 159, 3 S.W.3d 684, 690 (1999).

***California*:** An asbestos personal injury plaintiff is required to bring an action by the later of one year after the date he first suffered disability or one year after he "either knew, or through the exercise of reasonable diligence should have known, that such disability was caused or contributed to by such exposure." CAL. CODE CIV. PROC. § 340.2; the general rule is stated as follows: "Generally speaking, to be actionable, harm must constitute something more than 'nominal damages, speculative harm, or the threat of future harm – not yet realized. . . .' [*citations omitted*]. In California, harm or injury to the plaintiff is an essential element of a ripe cause of action in negligence or strict liability. [*citations omitted*]. Moreover, as a general proposition it is settled that a plaintiff's cause of action

accrues for purposes of the statute of limitations upon the occurrence of the *last* element essential to the cause of action; that is when the plaintiff is first entitled to sue." *Buttram v. Owens-Corning Fiberglas Corp.*, 16 Cal.4th 520, 531, 941 P.2d 71, 81, 66 Cal.Rptr. 2d 438 (1997).

Colorado: " . . . a cause of action for injury to person, property, reputation, possession, relationship, or status shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence." COLO. REV. STAT. § 13-80-108(1).

Connecticut: "No product liability claim . . . shall be brought but within three years from the date when the injury, death or property damage is first sustained or discovered or in the exercise of reasonable care should have been discovered. . . ." CONN. GEN. STAT. § 52-577a(a) (2003) (note: also includes a statute of repose).

Delaware: " . . . this Court and the Superior Court have applied the discovery exception to defer the running of the . . . limitations period in circumstances where the plaintiff has been exposed to a toxic substance, but the nature of the injury involves a latency period where the harmful effects of the toxic exposure are not discoverable for several years." *Brown v. E.I. Dupont de Nemours & Co.*, 820 A.2d 362, 367 (Del. 2003).

District of Columbia: "The precise date on which the three-year period . . . began to run is determined by the application *vel non* of the 'discovery rule' to this type of action." *Owens-Corning Fiberglas Corp. v. Henkel*, 689 A.2d 1224, 1231 (D.C. 1997).

Florida: " . . . regardless of the underlying nature of a cause of action, the accrual of the same must coincide with the aggrieved party's discovery or duty to discover the act constituting an invasion of his legal rights." *Creviston v. General Motors Corp.*, 225 So.2d 331, 334 (Fla. 1969) (non toxic tort product liability case).

Georgia: " . . . Georgia courts have clearly held that in a continuing tort a cause of action does not accrue so as to cause the statute of limitation to run until a plaintiff discovers or with reasonable diligence should have discovered that he was injured." *King v. Seitzinger, Inc.*, 160 Ga. App. 318, 287 S.E.2d 252, 254 (1981); "On a tort claim for personal injury, the statute of limitations generally begins to run at the time the damage caused by the tortious act occurs, at which time the tort is complete. . . . While the [latent disease] tort is then complete in the sense that it will support a claim, it is nevertheless a tort of a continuing nature which tolls the statute of limitation so long as the continued exposure to the hazard is occasioned by the continued failure of the tortfeasor to warn the victim, and the statute of limitation does not commence to run under these circumstances until such time as the continued tortious act of producing injury is eliminated, e.g., by an appropriate warning in respect to the hazard." *Everhart v. Rich's, Inc.*, 229 Ga.. 798, 801-802, 194 S.E.2d 425, 428, (1972), *answer to certified question conformed to*, 128 Ga.App. 319, 196 S.E.2d 475 (Ga.App. 1973).

Hawaii: "Under Hawaiian law, an action for personal injury or property damage does not accrue, and the applicable statute of limitations does not commence, until a plaintiff 'could reasonably have been aware that she had a claim.'" *In re Hawaii Federal Asbestos Cases*, 854 F. Supp. 702, 706 (D. Hawaii 1994), quoting *Yamaguchi v.*

Queen's Medical Center, 65 Haw. 84, 90, 648 P. 2d 689, 693 (1982).

Idaho: " . . . a cause of action does not accrue at the time of the act complained of unless some damage has occurred." *Hawley v. Green*, 117 Idaho 498, 502, 788 P.2d 1321, 1325 (1990) (medical malpractice case – the author could find no toxic tort case on point).

Illinois: "We are of the opinion that the preferred rule is that the cause of action accrues when the plaintiff knows or reasonably should know of an injury and also knows or reasonably should know that the injury was caused by the wrongful acts of another." *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 169, 421 N.E. 2d 864, 868 (1981) (but such claims are now subject to a statute of repose, 735 IL. COMP. STAT. § 13-213).

Indiana: "A product liability action for personal injury, disability, disease, or death resulting from exposure to asbestos accrues on the date when the injured person knows that the person has an asbestos-related disease or injury." IND. CODE ANN. § 34-20-3-2(b); ". . . a plaintiff may bring suit within two years after discovering a disease and its cause, notwithstanding that the discovery was made more than ten years [the period of an applicable statute of repose] after the last exposure to the product that caused the disease." *Covalt v. Carey Canada, Inc.*, 543 N.E.2d 382, 384 (Ind. 1989); see also *Barnes v. A.H. Robbins* [sic] *Company*, 476 N.E.2d 84 (Ind. 1985) ("discovery" accrual rule adopted in cases involving the Dalkon shield intrauterine device); *Allied Resin Corporation v. Waltz*, 574 N.E.2d 913, 915 (Ind. 1991) ("discovery" accrual rule expanded to include all toxic tort claims).

Iowa: " . . . the cause of action shall be deemed to have accrued when the disease and such disease's cause have been made known to the person or at the point the person should have been aware of the disease and such disease's cause." IOWA CODE § 614.1 – 2Ab(1).

Kansas: Personal injury and wrongful death actions " . . . shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party. . . ." KAN. STAT. ANN. § 60-513(b); the 10-year statute of repose is also not applicable in latent disease product liability cases. KAN. STAT. ANN. § 60-3303(d)(1).

Kentucky: "We therefore extend the [discovery] rule as explicated herein to tort actions for injury from latent disease caused by exposure to a harmful substance whether the action be based on negligence or on a products liability theory." *Louisville Trust Co. v. Johns-Manville Products Corp.*, 580 S.W.2d 497, 501 (Ky. 1979).

Louisiana: "Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained." LOUISIANA CIVIL CODE art. 3492; "Damage is considered to have been sustained, within the meaning of the article, only when it has manifested itself with sufficient certainty to support accrual of a cause of action." *Cole v. Celotex Corp.*, 620 So.2d 1154, 1156 (La. 1993).

Maine: " . . . a judicially recognizable claim does not arise until there has been a manifestation of physical injury to a person, sufficient to cause him actual loss,

damage or suffering from a defective, unreasonably dangerous product." *Bernier v. Raymark Industries, Inc.*, 516 A.2d 534, 543 (Me. 1986).

Maryland: "For reasons that follow, we hold that a plaintiff's cause of action for latent disease, whether framed in terms of negligence or strict liability, accrues when he discovers, or through the exercise of reasonable care and diligence should have discovered, the nature and cause of his disability or impairment." *Harig v. Johns-Manville Products Corp.*, 284 Md. 70, 71, 394 A.2d 299, 300 (1978).

Massachusetts: " . . . the discovery rule has been applied to causes of action based on 'inherently unknowable' wrongs. [*citation omitted*]. There is no sound reason why the same accrual rule should not apply to actions to recover damages for an insidious disease caused by negligence." *Olsen v. Bell Telephone Laboratories, Inc.*, 388 Mass. 171, 175, 445 N.E.2d 609, 612 (1983).

Michigan: " . . . we hold that plaintiffs who develop asbestosis may bring a suit within three years of the time they discover or should have discovered their disease." *Larson v. Johns-Manville Sales Corp.*, 427 Mich. 301, 319, 399 N.W.2d 1, 9 (1986).

Minnesota: "An action for negligence cannot be maintained, nor does the statute of limitations begin to run, until damage has resulted from the alleged negligence." *Dalton v. Dow Chemical Co.*, 280 Minn. 147, 153, 158 N.W.2d 580, 584 (1968).

Mississippi: "In actions . . . which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence

should have discovered, the injury." MISS. CODE ANN. § 15-1-49(2).

Missouri: " . . . the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained." MO. ANN. STAT. § 516.100.

Montana: "The period of limitation does not begin on any claim or cause of action for an injury to person or property until the facts constituting the claim have been discovered or, in the exercise of due diligence, should have been discovered by the injured party if (a) the facts constituting the claim are by their nature concealed or self-concealing; or (b) before, during, or after the act causing the injury, the defendant has taken action which prevents the injured party from discovering the injury or its cause." MONT. CODE ANN. § 27-2-102(3); " . . . in latent disease or injury cases, the point at which the statute of limitations begins to run is ascertained by applying the discovery rule and determining when the injured person knew or, in the exercise of due diligence, should have known of the facts constituting the cause of action." *Gomez v. State of Montana*, 293 Mont. 531, 535, 975 P.2d 1258, 1260 (1998).

Nebraska: "It seems to us that it would be a Hobson's choice to suggest, on the one hand, that one could not maintain a cause of action unless and until one could show not only a breach of duty but an injury or damage resulting from that breach and, on the other hand, to suggest that the time for bringing that action could begin

and terminate before the individual could either reasonably be aware of the injury or damage or be able in any manner to establish its existence. . . . These rules are consistent with our own rules in such matters. It has long been recognized in this jurisdiction that a cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain a suit." *Condon v. A. H. Robins Co., Inc.*, 217 Neb. 60, 64, 349 N.W.2d 622, 625 (1984) (but may be subject to a statute of repose).

Nevada: " . . . the term 'accrued,' as used in NRS 11.220, incorporates the same 'diligent discovery' rule that is present in NRS 11.190(3), 11.207, and 41A.097. As the court said [*citation omitted*], '[t]o hold otherwise would transmute the statute from one of limitation into one of abolition. . . . Such a result is not consonant with the legislative purpose of the statute.' When the plaintiff knew or in the exercise of proper diligence should have known of the facts constituting the elements of his cause of action is a question of fact for the trier of fact." *Oak Grove Investors v. Bell & Gossett Co.*, 99 Nev. 616, 623, 668 P.2d 1075, 1079 (1983).

New Hampshire: " . . . all personal actions, except actions for slander or libel, may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of." N.H. REV. STAT. ANN. § 508:4.

New Jersey: "When personal injury is suffered without perceptible trauma and by silent and insidious impregnation as a consequence of the act or omission of another, who knows, or is charged with the responsibility of knowing that such act or omission may result in personal injury, and the injured person is unaware of the cause of his injury, and as a reasonably prudent and intelligent person could not, without specialized knowledge, have been made aware of such cause, no action for a tort resulting from such cause begins to accrue until the injured person knows or by the exercise of reasonable diligence should have discovered the cause of such injury." *Vispisiano v. Ashland Chemical Co.*, 107 N.J. 416, 435, 527 A.2d 66, 76 (1987), quoting with approval *Warrington v. Charles Pfizer & Co.*, 274 Cal.App.2d 564, 569-570, 80 Cal.Rptr. 130, 133 (Ct. App. 1969).

New Mexico: "The reason that the limitation period runs from the injury rather than from the wrongful act, is that there is no cause of action for malpractice until there has been a resulting injury. [*citation omitted*]. A wrong without damage or damage without wrong does not amount to a cause of action. [*citations omitted*]. . . . In personal injury actions not involving malpractice, the limitation period stated in § 23-1-8, supra, has been held to run from 'the time of the injury not the time of the negligent act.' [*citations omitted*]." *Peralta v. Martinez*, 90 N.M. 391, 393, 564 P.2d 194, 196 (N.M. Ct. App. 1977).

New York: " . . . the three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery

of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier." N.Y. CIVIL PRACTICE LAW AND RULES § 214-c(2).

North Carolina: " . . . for personal injury or physical damage to claimant's property, the cause of action . . . shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." N.C. GEN. STAT. § 1-52 (16) (but actions are subject to a 10-year statute of repose).

North Dakota: "An action to recover damages based on injury allegedly resulting from exposure to asbestos composed of chrysotile, amosite, crocidolite, tremolite, anthophyllite, actinolite, or any combination thereof, must be commenced within three years after the injured person has been informed of discovery of the injury by competent medical authority and that the injury was caused by exposure to asbestos as described in this subsection, or within three years after the discovery of facts that would reasonably lead to the discovery, whichever is earlier." N.D. CENT. CODE § 28-01.3-08(4); other actions: "The presumption that the discovery rule applies except where the Legislature specifies otherwise is consistent with the perception that the determination as to when a cause of action accrues is a judicial function in the absence of legislative definition of that term." *Hebron Pub. School Dist. No. 13 v. United States Gypsum Co.*, 475 N.W.2d 120 (N.D. 1991).

Ohio: " . . . a cause of action for bodily injury caused by exposure to asbestos or to chromium in any of its chemical forms arises upon the date on which the plaintiff

is informed by competent medical authority that the plaintiff has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, the plaintiff should have become aware that the plaintiff had been injured by the exposure, whichever date occurs first." .... " . . . a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, arises upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has been injured by such exposure." .... " . . . a cause of action for bodily injury which may be caused by exposure to diethylstilbestrol or other nonsteroidal synthetic estrogens, including exposure before birth, upon the date on which the plaintiff learns from a licensed physician that the plaintiff has an injury which may be related to such exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have become aware that the plaintiff has an injury which may be related to such exposure, whichever date occurs first." OHIO REV. CODE ANN. § 2305.10; in general: "In a line of cases [*citations omitted*] this court established a threshold point at which government may impose a statute of limitations on a potential claimant. That line of decisions established that a statute of limitations could not begin to run before a claimant knew or should have known of her injury. . . . knowledge of the injury's cause is a part of the knowledge required before a statute of limitations may begin to run." *Burgess v. Eli Lilly and Co.*, 66 Ohio St. 3d 59, 61, 1993 Ohio 193, 609 N.E.2d 140, 141 (1993).

Oklahoma: " . . . the statute of limitations for such a claim does not begin to run until the plaintiff knows, or as a reasonably prudent person should know, that he has

the condition for which his action is brought and that the defendant caused it." *Daugherty v. Farmers Coop. Assn.*, 1983 Okla. Civ. App. LEXIS 158 (Okla.Ct.App. 1983).

Oregon: " . . . a product liability civil action for personal injury or property damage must be commenced not later than . . . two years after the date on which the plaintiff discovers, or reasonably should have discovered, the personal injury or property damage and the causal relationship between the injury or damage and the product, or the causal relationship between the injury or damage and the conduct of the defendant." OREGON REV. STAT. 30.905(2) (but subject to 10-year statute of repose); in general: "The statute of limitations begins to run when a reasonably prudent person associates his symptoms with a serious or permanent condition and at the same time perceives the role which the defendant has played in inducing that condition." *Schiele v. Hobart Corp.*, 284 Ore. 483, 490, 587 P.2d 1010, 1014 (1978).

Pennsylvania: "An action to recover damages for injury to a person or for the death of a person caused by exposure to asbestos shall be commenced within two years from the date on which the person is informed by a licensed physician that the person has been injured by such exposure or upon the date on which the person knew or in the exercise of reasonable diligence should have known that the person had an injury which was caused by such exposure, whichever date occurs first." PA. STAT. ANN. tit. 42 § 5524; in general: "The Court also agrees that the discovery rule applies. As DEP notes, if a provision such as Section 605(c) neither expressly nor implicitly prohibits application of the discovery rule, the courts are free to employ it." *Westinghouse Elec. Corp. v. Pennsylvania Dep't*

of Envtl. Protection, 705 A.2d 1349, 1355 (Pa. Commw. Ct.1998).

Rhode Island: "We are convinced, after reviewing the case law and weighing the equitable considerations, that the better view would be to adopt the following rule: in a drug product-liability action where the manifestation of an injury, the cause of that injury, and the person's knowledge of the wrongdoing by the manufacturer occur at different points in time, the running of the statute of limitations would begin when the person discovers, or with reasonable diligence should have discovered, the wrongful conduct of the manufacturer." *Anthony v. Abbott Laboratories*, 490 A.2d 43, 46 (R.I. 1985); "To construe the statute narrowly so as to preclude a person from obtaining a remedy simply because the wrong of which he was the victim did not manifest itself for at least two years from the time of the negligent conduct, is clearly inconsistent with the concept of fundamental justice. To require a man to seek a remedy before he knows of his rights, is palpably unjust." *Wilkinson v. Harrington*, 104 R.I. 224, 238, 243 A.2d 745, 753 (1968).

South Carolina: All personal injury actions other than medical malpractice "must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." S.C. CODE ANN. § 15-3-535.

South Dakota: Product liability actions " . . . may be commenced only within three years of the date when the personal injury, death or property damage occurred, became known or should have become known to the injured party." S.D. CODIFIED LAWS § 15-2-12.2.

Tennessee: " . . . in products liability cases . . . the cause of action for injury to the person shall accrue on the date of the personal injury, not the date of the negligence or the sale of a product." TENN. CODE ANN. § 28-3-104(b)(1); "A personal injury cause of action accrues when the plaintiff knows, or in the exercise of reasonable care and diligence should know, that an injury has been sustained." *Wyatt v. ACandS, Inc.*, 910 S.W.2d 851, 854 (Tenn. 1995).

Texas: "The discovery rule represents an attempt to balance society's interest to have disputes either settled or barred within a reasonable time in situations in which it is difficult for the injured party to learn of the negligent act. [*citations omitted*] The discovery rule applies if: (1) the injury is inherently undiscoverable; and (2) the evidence of the injury is objectively verifiable." *Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 530-531 (Tex. 1997).

Utah: "A civil action under this chapter [product liability] shall be brought within two years from the time the individual who would be the claimant in such action discovered, or in the exercise of due diligence should have discovered, both the harm and its cause." UTAH CODE ANN. § 78-15-3.

Vermont: " . . . injuries to the person suffered by the act or default of another person . . . shall be deemed to accrue as of the date of the discovery of the injury." VT. STAT. ANN. Tit. 12 § 512(4).

Virginia: "Code § 8.01-230 specifies that a cause of action for personal injuries shall be deemed to accrue and the prescribed limitation period shall commence to run *from the date the injury is sustained*. We construe the statutory word 'injury' to mean positive, physical or

mental hurt to the claimant, not legal wrong to him in the broad sense that his legally protected interests have been invaded. Thus, the running of the time is tied to the fact of harm to the plaintiff, without which cause of action would come into existence; it is not keyed to the date of the wrongful act, another ingredient of a personal injury cause of action." *Locke v. Johns-Manville Corp.*, 221 Va. 951, 957-958, 275 S.E.2d 900, 904 (1981).

Washington: "In a products liability action, the statute of limitation does not begin to run until the plaintiff has discovered or should reasonably have discovered all the essential elements of the action." *Sahlie v. Johns-Manville Sales Corp.*, 99 Wn.2d 550, 553, 663 P.2d 473, 475 (1983).

West Virginia: "In products liability cases, the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence should know, (1) that he has been injured, (2) the identity of the maker of the product, and (3) that the product had a causal relation to his injury." *Hickman v. Grover,* 178 W. Va. 249, 252, 358 S.E.2d 810, 813.

Wisconsin: "In the interest of justice and fundamental fairness, we adopt the discovery rule for all tort actions other than those already governed by a legislatively created discovery rule. Such tort claims shall accrue on the date the injury is discovered or with reasonable diligence should be discovered, whichever occurs first. All cases holding that tort claims accrue at the time of the negligent act or injury are hereby overruled." *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 560, 335 N.W.2d 578, 583 (1983).

Wyoming: "Wyoming is a 'discovery' state; therefore, the statute of limitations is triggered when the plaintiff

knows or has reason to know the existence of the cause of action." *Olson v. A.H. Robins Co.*, 696 P.2d 1294, 1297 (Wyo. 1985).

No. 06-1329

FILED
MAY 1 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

MARTHA JANE CLINE, Executrix of the Estate of Jackie Edward Cline,

Petitioner,

v.

ASHLAND, INC.; CHEVRON PHILLIPS CHEMICAL LP, successor in interest to CHEVRON CHEMICAL COMPANY, LLC; and EXXON MOBIL CORPORATION,

Respondents.

On Petition For A Writ Of *Certiorari* To The Supreme Court Of Alabama

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CORPORATE DISCLOSURE

In accordance with Supreme Court Rule 29.6, Respondents disclose the following:

1. Ashland, Inc., is a corporation whose stock is publicly traded. It does not have a parent corporation. No publicly held company owns 10% or more of the stock of Ashland, Inc.

2. Exxon Mobil Corporation is a corporation whose stock is publicly traded. It does not have a parent corporation. No publicly held company owns 10% or more of the stock of Exxon Mobil Corporation.

3. Chevron Phillips Chemical Company is a joint venture owned by Chevron Corporation and ConocoPhillips, each of which is a publicly traded company.

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PERCEIVED MISSTATEMENTS OF FACT OR LAW

Pursuant to Supreme Court Rule 15.2, Respondents suggest that the following misstatements of fact or law appear in the petition:

1. The "manifest, present injury" rule is not an "ancient" rule in Alabama. *See* Pet. at 5. To the contrary, that phrase was first used by the Supreme Court of Alabama in *Hinton v. Monsanto Co.*, 813 So. 2d 827, 829 (Ala. 2001), a case in which plaintiffs sought medical monitoring costs while disavowing any present injury or illness. None of the five cases that *Hinton* cited as support for its reference to a "manifest, present injury" rule was actually a personal injury case, and each of those five decisions was issued after 1995.

2. *Thomas v. BSE Indus. Contractors, Inc.*, 624 So. 2d 1041 (Ala. 1993), did not apply the "manifest, present injury" rule. *See* Pet. at 5. *Thomas* was not even a personal injury case. Rather, it was a case brought under Alabama's tort of outrage cause of action, which required plaintiff to prove that defendant engaged in intentional or reckless conduct that was extreme and that caused plaintiff to suffer emotional distress so severe that no reasonable person could be expected to endure it. *Id.* at 1043. Summary judgment was affirmed in *Thomas* not because of a lack of a "manifest, present injury," but rather because the court concluded that "Thomas's generalized fear of cancer, unsupported by any clinical evidence, does not rise to the level of 'severe emotional distress' necessary to present a jury question on the tort of outrage." *Id.* at 1046.

ADDITIONAL JURISDICTIONAL FACTS

Petitioner's Statement of the Case contains many of the facts necessary to this Court's determination of its jurisdiction to review this case, but such Statement omits

a number of facts relevant to the jurisdictional analysis. Those omitted facts include all of the following:

1. There was no mention in Petitioner's decedent's[1] Complaint[2] of any constitutional or other challenge to the two year statute of limitations applicable to decedent's tort claims. App. 1.

2. Respondents in their May 23, 2001, Answer specifically averred that "all of plaintiff's claims are barred by the applicable statutes of limitation." App. 8.

3. Following investigation and discovery, on August 28, 2002, Respondents filed a motion for summary judgment, relying solely upon the argument that all of the claims presented were barred by the applicable statutes of limitation. App. 11; 15-16.

4. Decedent's October 7, 2002, response to the motion for summary judgment did not raise any challenge to the constitutionality of the statutes of limitation. Rather, the response simply averred that the tort claims were not barred by the two year statute of limitations because decedent had been exposed to benzene supplied by one of the other defendants within the two year period before he filed his Complaint. App. 19; 21-27.

5. On January 14, 2003, the trial court denied Respondents' motion for summary judgment as to decedent's

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[1] Petitioner is the Executrix of the Estate of Jack Cline, who died shortly after the Supreme Court of Alabama issued its second no opinion affirmance in this case on January 5, 2007. For ease of reference, Mary Jane Cline will be referred to herein as "Petitioner" and Jack Cline will be referred to herein as "decedent."

[2] The Complaint also named as defendants BP Amoco Chemical Company, BP Amoco Corporation, Holmes Oil Company, Inc., and Thompson & Formby Company. In exchange for *pro tanto* settlement payments totaling $60,000.00, decedent in January of 2005 stipulated to the dismissal of his claims against all defendants other than Respondents.

tort claims, but it granted the motion for summary judgment as to decedent's breach of warranty claim.[3] App. 29.

6. On January 8, 2004, Respondents filed a second motion for summary judgment. In addition to renewing their contention that decedent's claims were barred by the two year statute of limitations, Respondents asserted that they were separately and independently entitled to summary judgment on state law substantive grounds. App. 30-31.

7. Decedent served his response on June 21, 2004. There was no mention therein of any challenge to the constitutionality of the two year statute of limitations. In fact, decedent simply took the position that the statute of limitations issue had already been decided in his favor and that the issue need not be reconsidered. App. 37.

8. The trial court heard arguments on Respondents' motion for summary judgment on January 12, 2005, and took the motion under submission at that time. During such arguments, counsel for decedent did not raise or assert any challenge to the constitutionality of the two year statute of limitations.

9. The constitutional due process issue was first suggested in an *amicus curiae* brief filed on February 8, 2005, while the summary judgment motion was under submission. But neither that brief nor its accompanying article was served upon the Attorney General of the State of Alabama, as is required by Alabama law when a party challenges the constitutionality of a statute.[4] ALA. CODE § 6-6-227 (1975).

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[3] The breach of warranty claim was governed by a separate statute of limitations that required that the claim be brought within four years from the tender of delivery of the product. ALA. CODE § 7-2-725 (1975).

[4] As Respondents understand Petitioner's claimed constitutional question, it is that the Alabama statute of limitations, ALA. CODE § 6-5-38(l) (1975), is unconstitutional as applied to toxic tort victims with

(Continued on following page)

10. Decedent's Notice of Appeal did not identify any constitutional issue. The "ISSUES" section of the Notice of Appeal identified only a single non-constitutional issue:

> In an AEMLD personal injury action for injury caused by exposure to a toxic substance, does the statute of limitations accrue against all joint tortfeasors upon the plaintiff's last exposure to the toxic substance.

App. 52. Also, decedent answered "No" to the specific question on the Notice of Appeal form whether the provisions of Rule 44 of the Alabama Rules of Appellate Procedure[5] were applicable to the appeal. App. 50. That question is posed in a box on the Notice of Appeal form entitled "CONSTITUTIONAL ISSUES." *Id.*

11. On appeal to the Supreme Court of Alabama, in addition to arguing the bar created by the statute of limitations to sustain the trial court's judgment, Respondents also argued that the judgment should be affirmed because: (a) decedent had not produced substantial evidence that he experienced a substantial benzene exposure; (b) he had not produced substantial evidence that any product supplied by any Respondent was defective or unreasonably dangerous; and (c) he had not produced any admissible evidence causally associating his illness with any exposures. Pet. App. at 83. Under Alabama law, the Supreme Court of Alabama was authorized to affirm the

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latent or late-discovered injuries, because it bars lawsuits filed more than two years after the last date on which the claimed exposure occurred.

[5] Rule 44 of the Alabama Rules of Appellate Procedure, similar to ALA. CODE § 6-6-227 (1975), requires that any party in an appellate matter challenging the validity of any statute serve a copy of the party's written brief on the Alabama Attorney General. Decedent's counsel did serve copies of his appellate briefs on the Alabama Attorney General, evidencing counsel's belief that a challenge to the constitutionality of a statute was involved.

judgment of the trial court on any of these bases, notwithstanding that the trial court's judgment relied solely upon the bar created by the statute of limitations. *Liberty Nat'l Life Ins. Co. v. Univ. of Ala. Hlth. Svcs. Found.*, 881 So. 2d 1013, 1020 (Ala. 2003).

REASONS FOR DENYING THE WRIT

The petition for writ of certiorari should be denied because this Court lacks jurisdiction to reach the constitutional issue that Petitioner presents. However, in the event that the Court nevertheless determines that it has jurisdiction to review the no opinion affirmance of the Supreme Court of Alabama, the Court should nevertheless exercise its ample discretion and deny the petition because Petitioner has not demonstrated any compelling reason why this Court should exercise its discretion to accept the petition, nor has she demonstrated that a question of substantial constitutional importance is presented.

I. THIS COURT LACKS JURISDICTION.

Petitioner presents the substantive question whether ALA. CODE §§ 6-2-30(a) and 6-2-38(a), as interpreted by the Supreme Court of Alabama, violate Petitioner's due process rights under the Fourteenth Amendment of the United States Constitution. Pet. at i. However, before this Court can or should endeavor to answer this question, it must first determine whether it has jurisdiction to do so. *See, e.g., Adams v. Robertson*, 520 U.S. 83 (1997) (dismissing writ of certiorari as improvidently granted when it became apparent that the Court did not have jurisdiction). As stated in *Williams v. Kaiser*, 323 U.S. 471 (1945):

> It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction

> and that its decision of the federal question was necessary to its determination of the cause . . . And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it.

Id. at 477 (internal citations omitted); *see also Lynch v. New York*, 293 U.S. 52, 54 (1934). In the present case, the petition should be denied because the record does not show that the Supreme Court of Alabama was presented or decided the federal question. In fact, the Supreme Court of Alabama did not have jurisdiction to decide the federal question. Further, the decision of the state court could have been decided on independent and adequate state grounds, which likewise deprives this Court of jurisdiction to review the question presented.

A. The Supreme Court of Alabama did not decide the federal constitutional issue that is presented by the petition.

The threshold procedural requirement for United States Supreme Court review is that the federal question has been presented to the state courts. Charles A. Wright, et al., 16B Fed. Prac. & Proc. Juris. 2d § 4022. With "very rare exceptions," the Court has "adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision [the Court] has been asked to review." *Adams*, 520 U.S. at 86 (citing *Yee v. Escondido*, 503 U.S. 519, 533 (1992)); *see also, e.g., Heath v. Alabama,* 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 217-19 (1983); *Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner*, 139 U.S. 293 (1891) (dismissing appeal for want of jurisdiction where the highest court of the state affirmed with no opinion when it was

unclear whether the lower court decided on state or federal law grounds). Furthermore, it must appear "on the face of the record" that the state court considered the federal question "before it can be re-examined in this court." *Railroad Co. v. Rock*, 71 U.S. 177, 180 (1866) (holding even where state court certified that the federal question was presented this Court found it not authoritative and examined it independently and found the record did not support this contention).

The party seeking review must carry the burden of proving that the federal question was presented to the state courts. *E.g., Campbell v. Louisiana*, 523 U.S. 392, 401 (1998); *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974); *Street v. New York*, 394 U.S. 576, 582 (1969). But, it is clear that the Supreme Court of Alabama did not review or decide the federal due process issue in this case. The Supreme Court of Alabama simply affirmed, without opinion, the trial court's grant of summary judgment. The trial court's grant of summary judgment was not based on, and did not even address, the federal due process issue. Pet. App. at 54-55. The trial court judgment was instead based on long-standing and oft-reaffirmed Alabama law relating to the applicable statutes of limitation: "plaintiff's claims against those defendants expired within two years of his last exposures to their products (1989), or within four years of the last tender of delivery of benzene by any of them to which he was exposed (1991)." Pet. App. at 55. The trial court also concluded that recent exposures to one manufacturer's product did not serve to resurrect decedent's claims against manufacturers of other products to which he was previously exposed.[6] *Id.* As Petitioner concedes, there is absolutely no mention of the federal due process issue in any of the concurrences or in the dissent

[6] This was the holding that decedent actually appealed to the Supreme Court of Alabama, according to his Notice of Appeal. App. 52.

to the no opinion affirmance of the Supreme Court of Alabama. Pet. at 9. Under the circumstances, Petitioner has failed to meet her burden of demonstrating that the question presented in this Court was presented to the court below or that the court below actually decided the question.

When the state court decision is silent on the federal issue, as in this case, this Court assumes that the issue was not properly presented to the highest state court and the petitioner bears the burden of defeating this assumption "by demonstrating that the state court had 'fair opportunity to address the federal question. . . .'" *Adams*, 520 U.S. at 86-87 (quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981)); *see also, e.g., New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). In *Adams*, the Court described the different ways a petitioner may satisfy this requirement:

> In some cases, we have focused on the need for petitioners either to establish that the claim was raised "'at the time and in the manner required by the state law,'" or to persuade us that the state procedural requirements could not serve as an independent and adequate state-law ground for the state court's judgment. In other cases, we have described a petitioner's burden as involving the need to demonstrate that it presented the particular claim at issue here with "fair precision and in due time."

Adams, 520 U.S. at 87 (internal citations omitted). In the present case, the federal claim was not presented to the Supreme Court of Alabama in the time and manner required by Alabama law, there are a number of substantive arguments that serve as independent and adequate state-law grounds for the decision of the Supreme Court of Alabama, and, in any event, the federal claim now made by Petitioner was not made with "fair precision and in due

time." Plainly, Petitioner has failed to make the requisite jurisdictional showing under *Adams*.

In *Webb v. Webb*, 451 U.S. 493 (1981), the petitioner argued that although the Georgia Supreme Court was silent in its opinion with regard to the federal question, the record demonstrated that she did raise the federal question and that the "State Supreme Court must be understood as having implicitly rejected her federal claim." 451 U.S. at 496. The Court recognized that the petitioner did use the constitutional phrase "full faith and credit" at several points in the proceedings, but found this insufficient. *Id.* at 498. Despite the absence of a full faith and credit provision in the Georgia Constitution, the Court still found that "[w]e cannot conclude on this record that petitioner raised the federal claim that she now presents to this court at any point in the state-court proceedings." *Id.* Citing the policy reasons[7] underlying the rule, this Court reasoned:

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[7] Policy reasons discussed in *Webb* and in other case law include: (1) "Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements." *Webb*, 451 U.S. at 499; *see also Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969); (2) "The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue." *Webb*, 451 U.S. at 500; (3) "The rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner." *Id.*; (4) "Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our own workload, this is a very substantial matter." *Id.* at 500-01. As demonstrated more fully herein, denying writ of certiorari in this case would serve all of these policy concerns.

> At the minimum, however, there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.

Id. at 501 (emphasis by the Court).

Similarly, in *Yee v. City of Escondido*, 503 U.S. 519 (1992), the petitioner did not raise federal due process claims in the state courts properly. Yee did not include a due process claim in his complaint, nor did he raise it in the California Court of Appeals. It was not until his petition for review to the California Supreme Court that Yee finally raised a substantive due process claim, but the California Supreme Court denied discretionary review. This Court stated that "[s]uch a denial, as in this Court, expresses no view as to the merits." *Id.* at 533. As such, this Court reasoned that the state court did not address the federal claim; therefore, the United States Supreme Court would not consider it. *Id.*

The burden on Petitioner to establish federal jurisdiction is even greater when the state's highest court is completely silent on the federal question, as in this case. In *Lynch*, *supra*, the state's highest court affirmed a trial court order without an opinion, "and the grounds of its decision [were] left to conjecture." 293 U.S. at 54. Although language in the lower court's decision suggested that it decided the federal issue, and "[i]t may be surmised . . . that the affirmance . . . went upon the same ground," that was insufficient to establish the Court's jurisdiction because "jurisdiction cannot be founded upon surmise." *Id.*; *see also Exxon Corp. v. Eagerton,* 462 U.S. 176, 181 n.3 (1983) ("The decision below does not discuss th[e federal issue], and '*when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state*

courts, unless the aggrieved party in this Court can affirmatively show the contrary.'") (internal citations omitted) (emphasis added); *Cuyahoga River Power Co. v. Northern Realty Co.*, 244 U.S. 300, 304 (1917) (in the "absence of an opinion expressed by the court below, it is impossible to say whether its judgment was rested upon state questions adequate to sustain it independent of the Federal questions, or upon such Federal questions, both being in the case."). It is significant in this regard that under Alabama law the Supreme Court of Alabama will not decide the constitutionality of a statue unless the question is "essential" to the disposition of the cause. *E.g., City of Mobile v. Gulf Dev.*, 171 So. 2d 247, 255 (Ala. 1965); *Matter of Anonymous*, 515 So. 2d 1254, 1256 (Ala. Civ. App. 1987).

In the present case, there is no opinion below.[8] Petitioner cannot establish from the record that the Supreme Court of Alabama considered the federal due process issue. In fact, Alabama law presumes this issue was not decided because a decision on the constitutional issue was not essential to the disposition of the cause. The record reveals only that the Supreme Court of Alabama affirmed the trial court judgment, and it is absolutely clear that the trial court judgment was not based upon, and did not even make mention of, any federal due process issue. Finally, and perhaps most significantly, Petitioner's own Notice of Appeal to the Supreme Court of Alabama affirmatively

[8] The Alabama Rules of Civil Procedure provide that a no opinion affirmance "shall have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state," except for very limited purposes. Ala. R. App. Proc. 53(d). The Supreme Court of Alabama identified Rule 53(a)(2)(F) as the basis for its no opinion affirmance, which indicates that "[t]he Court, after a review of the record and the contentions of the parties, concludes that the judgment or order was entered without an error of law." *Id.*; Pet. App. at 2.

states that no constitutional issues were being presented. App. 50. For all of the foregoing reasons, this Court lacks jurisdiction and should deny the petition.

B. The Supreme Court of Alabama did not have jurisdiction itself to decide the federal constitutional issue that is presented by the petition.

The Supreme Court of Alabama could not have decided the federal due process issue in any event because it lacked jurisdiction itself over the issue inasmuch as decedent failed to raise the issue in the trial court. Under Alabama law, the Supreme Court of Alabama may reach and decide a constitutional issue "only when it has been raised by a party at the trial level. . . ." *Ex parte St. Vincent's Hospital*, 652 So. 2d 225, 228 (Ala. 1994); *see also Continental Eagle Corp. v. Mokrzycki*, 611 So. 2d 313, 322 (Ala. 1992); *Campbell v. Alabama Power Co.*, 567 So. 2d 1222, 1225 (Ala. 1990) (holding that issues not raised in the trial court may not be raised later on appeal); *Landers v. O'Neal Steel, Inc.*, 564 So. 2d 925, 926 (Ala. 1990) (failure to raise constitutional issue in trial court precludes review of that issue on appeal). Stated slightly differently, the law in Alabama is as follows:

> In order for an appellate court to review a constitutional issue, that issue must have been raised *by the appellant* and presented to and reviewed by the trial court. Additionally, in order to challenge the constitutionality of a statute, an appellant must identify and make specific arguments regarding what specific rights it claims have been violated.

Alabama Power Co. v. Turner, 575 So. 2d 551, 552 (Ala. 1991) (internal citations omitted) (emphasis added). Neither of these requirements was met in this case.

Petitioner simply argues that the constitutional issue was presented in an *amicus curiae* brief submitted to the trial court on February 4, 2005. Pet. at 7. But an argument not made by the parties themselves is not properly before the appellate court when presented in an *amicus* brief. 3B C.J.S. *Amicus Curiae* § 18; *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981); *Bell v. Wolfish*, 441 U.S. 520, 531 n.13 (1979); *Knetsch v. United States*, 364 U.S. 361, 370 (1970); *Nat'l Comm'n on Egg Nutrition v. Federal Trade Comm'n*, 570 F.2d 157, 160 n.3 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978). This reasoning should apply with equal force to arguments made to the trial court only in an *amicus* brief.

In Alabama, an *amicus curiae* is not considered a party in the action, and it cannot litigate issues that are not presented by the parties: "An amicus curiae is not a party, cannot assume the functions of a party, and cannot control the litigation." *Brackin v. Trimmier Law Firm*, 897 So. 2d 207, 232 (Ala. 2004) (statement of non-recusal by Justice Brown) (quoting *State ex rel. Baxley v. Johnson*, 300 So. 2d 106, 110-11 (Ala. 1974)); *see also Courtaulds Fibers, Inc. v. Long*, 779 So. 2d 198, 202 n.1 (Ala. 2000). Instead, an *amicus curiae* must "accept the case before the court with the issues made by the parties." *Brackin*, 897 So. 2d at 233 (quoting *Village of North Atlanta v. Cook*, 133 S.E.2d 585 (Ga. 1963)).

In the present case, decedent never made mention in the trial court of any federal constitutional issue at all, and the trial court opinion upon which the appeal was taken to the Supreme Court of Alabama made absolutely no mention of either state or federal constitutional issues. Since this argument was not presented to the trial court by a party, the Supreme Court of Alabama lacked jurisdiction to review or decide the federal constitutional issue now argued by Petitioner, and its own lack of jurisdiction now deprives this Court of jurisdiction to review the issue.

C. The decision of the Supreme Court of Alabama was based on adequate and independent state law grounds.

"This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *see also, e.g., Lambrix v. Singletary*, 520 U.S. 518, 523 (1997); *Eustis v. Bolles*, 150 U.S. 361, 366 (1893) ("It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question to sustain the judgment, this Court will not review the judgment."). This is true whether the state law ground is substantive or procedural. *Coleman*, 501 U.S. at 729; *see also, e.g., Webb*, 451 U.S. at 498 n.4 (recognizing that an independent state procedural ground could bar consideration of the federal issue). "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Coleman*, 501 U.S. at 729.[9]

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[9] In instances where state court decisions are based primarily on federal law grounds or are interwoven with federal and state grounds, the Court has employed a presumption that there is not a state law basis for the decision unless the state's highest court provides a "plain statement" that its decision was grounded on state law. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). However, this presumption is not applicable in every case and is not applicable in this case: "[i]n those

(Continued on following page)

In addition to the statute of limitations argument, Respondents rested their summary judgment motion on three state law substantive grounds, and Alabama law permitted the Supreme Court of Alabama to affirm the summary judgment on any of the grounds presented. On appeal from a summary judgment, the Supreme Court of Alabama performs a *de novo* review. *E.g., DeVenney v. Hill*, 918 So. 2d 106, 112 (Ala. 2005); *Mobile Airport Auth. v. HealthStrategies, Inc.*, 886 So. 2d 773, 779 (Ala. 2004). Accordingly, there is no presumption of correctness given to the trial court on any question of law. *E.g., Laster, Jr. ex rel. Laster, Sr. v. Norfolk Ry. Co., Inc.*, 2007 WL 30073, at *2 (Ala. 2007). As such, the Supreme Court of Alabama's decision could have rested on any of these state law grounds, each of which was independently adequate to support summary judgment in favor of Respondents. Since the summary judgment was affirmed without opinion, and since that affirmance likely was based in whole or in part on state substantive grounds,[10] the Court should adhere to *Coleman* and deny the petition.

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cases in which it does not fairly appear that the state court rested its decision primarily on federal grounds, it is simply not true that the 'most reasonable explanation' is that the state judgment rested on federal grounds." *Coleman*, 501 U.S. at 737; *see also Harris v. Reed*, 489 U.S. 255, 263 n.9 (1989) ("[The *Long* rule] necessarily applies only when a state court has been presented with the federal claim . . . "); *Long*, 463 U.S. at 1040 ("[w]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law . . . ").

[10] The Committee Comments to Rule 53 of the Alabama Rules of Civil Procedure suggest that a no-opinion affirmance is not appropriate in a case in which the court has been called upon "to construe a provision of a constitution," so the no-opinion affirmance in this case suggests that the Supreme Court of Alabama did not believe that the constitutional issue was before the Court. *See* Ala. R. Civ. P. 53 comm. cmts.

II. THERE IS NO COMPELLING REASON FOR THIS COURT TO EXERCISE ITS DISCRETION TO REVIEW THIS CASE.

Even if this Court concludes that it has jurisdiction to review the no opinion affirmance of the Supreme Court of Alabama, the Court should nevertheless refuse to grant discretionary review for all or any of the reasons set forth below.

A. Decedent was not deprived of his cause of action.

In 1987, when decedent was last exposed to benzene claimed to have been supplied by Respondents, Alabama law authorized him to pursue a claim against Respondents at any time within the two year period following the date on which he was last exposed. *American Mut. Liab. Ins. Co. v. Phillips*, 491 So. 2d 904, 906 (Ala. 1986); *Tyson v. Johns-Manville Sales Corp.*, 399 So. 2d 263, 268 (Ala. 1981); *Garrett v. Raytheon Co., Inc.*, 368 So. 2d 516 (Ala. 1979).[11] That was so because, at that time, Alabama law recognized that a cause of action accrued as soon as the claimant was entitled to maintain an action thereon, regardless of whether the full amount or extent of damages was apparent at the time of the first legal injury. *Langley v. Mut. Fire, Marine and Inland Ins. Co.*, 512 So. 2d 752, 764-65 (Ala. 1987); *Armstrong v. Life Ins. Co. of Virginia*, 454 So. 2d 1377, 1379 (Ala. 1984); *Garrett v. Raytheon Co., Inc.*, 368 So. 2d 516, 519 (Ala. 1979); *Home*

[11] The last date of exposure rule announced in *Garrett* has been repeatedly reaffirmed by the Supreme Court of Alabama. *See Becton v. Rhone-Poulenc, Inc.*, 706 So. 2d 1134, 1135-36 (Ala. 1997); *Johnson v. Garlock, Inc.*, 682 So. 2d 25, 28 (Ala. 1996) (holding that date of last exposure rule did not violate state or federal constitutional rights); *Hubbard v. Liberty Mut. Ins. Co.*, 599 So. 2d 20, 22 (Ala. 1992); *Hillis v. Rentokil, Inc.*, 596 So. 2d 888, 890 (Ala. 1992).

Ins. Co. v. Stuart-McCorkle, Inc., 285 So. 2d 468, 473 (Ala. 1973).

Decedent did not file a lawsuit against Respondents during that statutorily permitted period. Had he done so, he would have had the benefit of the *Garrett* decision, wherein the Supreme Court of Alabama held that "in the instant case the damage must have occurred at the time of exposure else defendant would not be liable," and that "[t]he injury in this case occurred on the date or dates of exposure." *Garrett,* 368 So. 2d at 520. Indeed, the *Garrett* court went on to specifically state that: "[t]his is not a case where an injury did not occur until it made itself manifest by its symptoms." *Id.* at 520-21. Thus, if decedent had filed a timely action against Respondents, he could have litigated his claim that Respondents supplied benzene products to his employer that were defective and unreasonably dangerous and that he was exposed to unhealthy levels of such products.

In an effort to create a federal constitutional issue that would permit review by this Court, Petitioner now argues that a decision[12] rendered by the Supreme Court of Alabama *twelve years after* the statute of limitations expired on her decedent's personal injury claim unconstitutionally deprived him of his cause of action. If the claimed inconsistencies between the decisions in *Garrett* and *Hinton* do in fact create or threaten a constitutional deprivation, judicial review of that claimed deprivation must await a plaintiff who has filed a timely action that has been dismissed for want of a manifest present injury. Decedent was not such a plaintiff.

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[12] *Hinton v. Monsanto Co.*, 813 So. 2d 827 (Ala. 2001), was decided on September 14, 2001.

B. There is no substantial federal question presented.

There is no question but that if the Alabama Legislature had amended the two year statute of limitations for tort actions while decedent had an existing right to pursue a cause of action against Respondents, and did not in connection therewith provide him reasonable time to pursue that cause of action, such amendment would have violated decedent's due process rights, as explained in *Terry v. Anderson*, 95 U.S. 628, 633 (1877). But this is not such a case.

Instead, decedent had a full two years in which to pursue his cause of action against Respondents, and he failed to do so. Under the prior decisions of this Court, decedent was thereby afforded the process to which he was constitutionally due. *Terry*, 95 U.S. at 632-33 ("This court has often decided that statutes of limitation affecting an existing right are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect."). The 2001 *Hinton* decision simply does not implicate decedent's federal due process rights.

While this Court has never squarely decided whether a statute of limitations enacted by a state legislature may constitutionally bar pursuit of a personal injury action before the plaintiff discovers that he or she has suffered an injury, the Court has passed on the opportunity to decide that specific question on at least seven occasions.

In *Woodward v. Burnham City Hospital*, 449 U.S. 807 (1980), the Court dismissed for want of a substantial federal question[13] an appeal of a decision of the Supreme

[13] Summary disposition by this Court of an appeal for want of a substantial federal question is a disposition on the merits of the case. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975); *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959).

Court of Illinois in which that court found no due process violation from legislative action "establishing the 4-year outer limit within which to file a complaint for medical malpractice." *See Anderson v. Wagner*, 402 N.E.2d 560, 568 (Ill. 1979).

In *Ellerbe v. Otis Elevator Co.*, 459 U.S. 802, *reh. denied*, 459 U.S. 1059 (1982), the Court similarly dismissed for want of a substantial federal question the appeal of a decision of the Texas Court of Civil Appeals holding that due process was not violated by a statute that barred suits against licensed engineers or architects for damages arising out of unsafe conditions of real property, where the relevant improvements to the property were completed more than ten years before the date the lawsuit was filed. *See Ellerbe v. Otis Elevator Co.*, 618 S.W.2d 870, 873 (Tex. Civ. App. 1981).

In *Bunker v. Nat'l Gypsum Co.*, 460 U.S. 1076 (1983), the court dismissed for want of a substantial federal question an appeal of a decision of the Supreme Court of Indiana, which held that Indiana's three year statute of limitations for asbestos exposure claims, *which commenced to run on the last date of exposure*, did not violate plaintiff's due process rights. *See Bunker v. Nat'l Gypsum Co.*, 441 N.E.2d 8, 13-14 (Ind. 1982).

On four other occasions, this Court has denied petitions for writs of certiorari in cases in which it would have been necessary to address the question presented in this petition. *Clark v. Gulesian*,[14] 400 U.S. 993 (1971); *Pitts v.*

[14] The First Circuit decision upheld Maine's medical malpractice statute of limitations, which began to run at the time of the wrongful act, finding that it was not an unconstitutional denial of equal protection or due process despite the fact that, in some cases, by the time the plaintiff learned of the injury, the cause of action would be barred. *Clark v. Gulesian*, 429 F.2d 405, 406 (1st Cir. 1970) ("Unfortunate as the present result may be for the plaintiff, the state may reasonably recognize that a defendant has an interest in repose, and in the

(Continued on following page)

GAF Corp.,[15] 464 U.S. 1003 (1983); *Wayne v. Tennessee Valley Auth.*,[16] 469 U.S. 1159 (1985); *Griffin v. Ford Motor Co.*,[17] 488 U.S. 822 (1988).

Accordingly, this Court has not traditionally believed that the question presented by Petitioner herein is a substantial federal question that requires the Court's attention and review.

C. None of the considerations set out in Supreme Court Rule 10 is present in this case.

Supreme Court Rule 10 identifies certain considerations that bear upon whether the Court should exercise its discretion to review a matter presented on a certiorari petition. Those considerations do not suggest that discretionary review is appropriate in this case.

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avoidance of stale claims, however free from fault the claimant's delay may be. Such a conclusion does not deprive the plaintiff of any constitutional right to fair or equal treatment.").

[15] The Seventh Circuit upheld Indiana's ten year statute of repose for product liability actions, which barred plaintiff's wrongful death action. *See Pitts v. Unarco Indus., Inc.*, 712 F.2d 276, 279 (7th Cir. 1983) ("we cannot accept plaintiff's argument that the Indiana Product Liability Act's ten-year statute of repose violates due process under the federal and Indiana Constitutions.").

[16] The Fifth Circuit decision upheld Tennessee's ten year statute of repose for product liability actions, which statute as adopted and applied resulted in some causes of action being barred before they accrued. *Wayne v. Tennessee Valley Auth.*, 730 F.2d 392, 404 (5th Cir. 1984).

[17] The underlying Eleventh Circuit decision in *Eddings v. Volkswagenwerk, A.G.*, 835 F.2d 1369 (11th Cir. 1988), upheld Florida's twelve year statute of repose for product liability actions, specifically holding that "Appellant's facial attack on the constitutionality of the Florida statute of repose is without merit. The United States Supreme Court, in cases raising the constitutionality of similar statutes, has found no violation of the Fourteenth Amendment." *Id.* at 1373.

1. There is no conflict between the no opinion affirmance of the Supreme Court of Alabama and the decision of any other state court of last resort or any United States court of appeal.

(a) State decisions.

Petitioner devotes six pages of her petition to the argument that the decision of the Supreme Court of Alabama conflicts with "numerous contrary decisions of other state courts of last resort." Pet. at 16-21. Yet one searches Petitioner's citations in vain for a state court decision holding that a date of last exposure accrual rule violates a party's due process rights. Instead, the decisions cited by Petitioner appear to be simple reaffirmations of this Court's holding in *Terry v. Anderson* that the enactment of a statute of limitations that does not provide a reasonable time for a party having a then-existing cause of action to pursue an action is unconstitutional. Alabama law, as noted above, provided decedent with a two year period following his last exposure in which to pursue an exposure-related cause of action, and that period was not modified. Since this is not a case in which the Alabama Legislature enacted a statute that retroactively reduced or eliminated the period available to decedent to pursue a cause of action, the *Terry* line of cases discussed at pages 18 through 21 of the petition are inapposite.

The truly instructive state court decisions in this regard that are mentioned in the petition are *Bunker v. Nat'l Gypsum Co.*, 441 N.E.2d 8 (Ind. 1982), *cert. denied*, 460 U.S. 1076 (1983), *Owen v. Wilson*, 537 S.W.2d 543 (Ark. 1976), and *Laughlin v. Forgrave*, 432 S.W.2d 308 (Mo. 1968). The *Bunker* court held that Indiana's three year statute of limitations for asbestos exposure claims, which commenced to run on the last date of exposure, did not violate plaintiff's due process rights. *Bunker*, 441 N.E. 2d at 13-14. The courts in *Owen* and *Laughlin* upheld the

Arkansas and Missouri medical malpractice statutes of limitation, despite the fact that each ran from the time of the wrongful act and therefore could bar medical malpractice claims that were not timely discovered. *Owen*, 537 S.W.2d at 545; *Laughlin*, 432 S.W.2d at 314-15.[18]

The proper entity to address the harsh effect of a statute is the state legislature. In response to the decisions in *Bunker*, *Owen* and *Laughlin*, state legislatures took action to address the claimed inequity in their respective statutory schemes. Such legislative action is precisely what the Supreme Court of Alabama advocated in *Garrett*, 368 So. 2d at 521. When the Alabama Legislature took such action, however, it did not do so properly, and, after the Act it passed was declared unconstitutional in 1982, it has not again enacted such legislation.[19]

Contrary to Petitioner's argument, no state court has yet recognized a constitutional right to a discovery rule applicable to all toxic tort claims. Therefore, the no opinion affirmance by the Supreme Court of Alabama is not in conflict with the decision of any other state court of last resort.

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[18] Courts in Delaware and Arizona have likewise concluded that no due process violation occurs when the effect of a statute of limitations is to bar a cause of action before the injury occurs or is discovered. *Dunn v. Felt*, 379 A.2d 1140 (Del. Super. 1977) (three year medical malpractice statute of limitations); *Landgraff v. Wagner*, 546 P.2d 26, 31-32 (Ariz. App. 1976) ("we do not agree that due process demands awareness of the right of action before the statute of limitations will run against it.").

[19] A bill (SB205) is currently pending in the Judiciary Committee of the Alabama State Senate that would adopt a discovery accrual rule for toxic tort actions. Similar legislation has been proposed but not adopted in the last two legislative sessions.

(b) Federal decisions.

Petitioner's arguments over pages 22 through 26 of her petition that the no opinion affirmance of the Supreme Court of Alabama also conflicts with decisions of various United States courts of appeal and that the opinions of such courts of appeal are also in conflict with each other, are likewise without merit. Petitioner failed to identify any federal court of appeals decision that has ever held unconstitutional a state toxic tort statute of limitations that runs from the date of last exposure. Instead, Petitioner relies on *Terry* and its progeny, which require states amending their statutes of limitation to provide a reasonable time within which a cause of action may be pursued after it has accrued. Pet. at 22-26. This is clearly misplaced reliance, for the *Terry* line of cases does not address whether a date of last exposure rule violates the Due Process Clause.

The four federal cases that Petitioner cites for the proposition that "a state may not constitutionally eliminate a cause of action without giving a litigant a reasonable amount of time to file suit" each involved a situation in which a state legislature enacted a law that eliminated or substantially reduced the period within which a party could pursue an existing cause of action. Pet. at 22-23. Since the instant case does not involve any claim that decedent's existing rights were barred by legislative action, these federal decisions cannot be said to be in conflict with the decisions sought to be reviewed here.

Moreover, those four cited federal decisions do not, as Petitioner contends, conflict with the four other United States court of appeals opinions cited and discussed by Petitioner at pages 23 and 24 of her petition. None of the latter decisions involved a situation in which a state legislature had enacted a law that eliminated or substantially reduced the period within which an existing cause of action could be filed. To the contrary – and entirely

consistent with the Alabama law under attack in the petition in this case – each of those latter decisions held that a state may constitutionally enact and enforce a statute of limitations even where its application may in some cases bar the filing of the cause of action before the plaintiff becomes aware of the existence of the cause of action. The Third Circuit decision in *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 555 (3rd Cir. 1986), provides a reasoned analysis of why such statutes of limitations do not violate the Due Process Clause:

> Because statutory periods are in some sense arbitrary, the period to initiate suit occasionally expires before a claimant has sustained any injury . . . or before the claimant knows he has sustained an injury. . . . Such a statute does not violate due process if the limitation period is otherwise reasonable. . . . Plaintiff's due process claim must therefore fail because here the period is reasonable.

Id. at 558 (citations omitted). Based upon this reasoning, the court upheld Pennsylvania's wrongful death and survival statutes of limitation in the face of an argument that the court should have instead judicially adopted a "discovery rule."

The four decisions cited by Petitioner as consistent with the no opinion affirmance decision of the Supreme Court of Alabama in this case were from the Third, Seventh, and Eighth Circuits. There are consistent decisions from the First, Second, Sixth, Ninth, and Tenth Circuits as well. *See Clark v. Gulesian*, 429 F.2d 405, 406 (1st Cir. 1970), *cert. denied*, 400 U.S. 993 (1971); *Dincher v. Marlin Fire Arms Co.*, 198 F.2d 821, 822-23 (2nd Cir. 1952) (upholding Connecticut statute that barred negligence claims filed more that one year from date of wrongful act, no matter when injury occurred); *Mathis v. Eli Lilly & Co.*, 719 F.2d 134, 139-41 (6th Cir. 1983) (upholding constitutionality of Texas statute limiting period within which

product liability action may be filed, even though statute would bar some claims before an injury occurred); *Pittman v. United States*, 341 F.2d 739, 741 (9th Cir. 1965) (upholding constitutionality of two year statute of limitations for Federal Tort Claims Act action even as to minors who were unable to pursue their claims without appointment of a guardian *ad litem*); *Brubaker v. Cavanaugh*, 741 F.2d 318, 320-21 (10th Cir. 1984) (rejecting due process challenge to Kansas medical malpractice statute of limitations that barred suits commenced more than four years after wrongful act).

The foregoing decisions are consistent as well with decisions from seven different United States courts of appeal rejecting federal constitutional challenges to state statutes of repose. *See Dinh v. Rust Int'l Corp.*, 974 F.2d 500, 502 (4th Cir. 1992) (upholding Virginia statute of repose applicable to injuries caused by improvements to real property); *Harris v. Black Clawson Co.*, 961 F.2d 547, 554-55 (5th Cir 1992) (upholding Louisiana's ten year statute of repose for defective design or construction claims); *Wayne v. Tennessee Valley Auth.*, 730 F.2d 392, 404 (5th Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985); *Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy*, 740 F.2d 1362, 1367-68 (6th Cir. 1984) (upholding Ohio's ten year statute of repose for actions arising out of improper design or construction of improvements to real property); *Van Den Hul v. Baltic Farmers Elevator Co.*, 716 F.2d 504, 510-12 (8th Cir. 1982) (upholding South Dakota's six year statute of repose for product liability actions); *Lourdes High School v. Sheffield Brick & Tile Co.*, 870 F.2d 443, 446 (8th Cir. 1989) (upholding Minnesota's fifteen year statute of repose for actions based upon real property damage); *Norwest Bank v. W.R. Grace & Co.*, 960 F.2d 754, 756-58 (8th Cir. 1998) (rejecting equal protection challenge to Nebraska's ten year statute of repose for product liability actions); *Branson v. O.F. Mossberg & Sons, Inc.*, 221 F.3d 1064, 1065 (8th Cir. 2000) (upholding Iowa's fifteen

year statute of repose for product liability actions); *Fields v. Legacy Health System*, 413 F. 3d 943, 956-57 (9th Cir. 2005) (upholding Oregon's five year statute of repose for medical malpractice actions); *Eaton v. Jarvis Prods. Corp.*, 965 F.2d 922, 931 n.10 (10th Cir. 1992) (upholding Colorado's seven year statute of repose for certain product liability actions); *Alexander v. Beech Aircraft Corp.*, 952 F.2d 1215 (10th Cir. 1991) (upholding Indiana's ten year statute of repose for product liability actions); *Eddings v. Volkswagenwerk, A.G.*, 835 F.2d 1369, 1373-74 (11th Cir.), *cert. denied sub nom. Griffin v. Ford Motor Co.*, 488 U.S. 822 (1988). These decisions are significant because statutes of repose are much more likely than are statutes of limitation to bar an action before it accrues or before an injured party has become aware of its existence, yet such statutes have been consistently upheld as constitutional despite creating or causing the very type of deprivation challenged in this petition.

There is no conflict between the no opinion affirmance of the Supreme Court of Alabama and the decisions of any United States court of appeals. Nor is there any conflict to be resolved between the decisions of the federal courts of appeal themselves. Therefore, there is no reason based on conflicting decisions for this Court to exercise its discretion to review this matter.

2. The no opinion affirmance of the Supreme Court of Alabama did not decide an important question of federal law that has not been decided by this Court.

As discussed above in Section II.B., this Court has repeatedly suggested that the question presented here is not an important or substantial question of federal law, by denying petitions for certiorari raising the same or similar issue on four separate occasions, and by dismissing three other appeals raising the same or similar issues for want of a

substantial federal question. If it is assumed *arguendo* that the Supreme Court of Alabama did "decide" the due process issue against Petitioner's decedent, it is nevertheless clear that this Court does not consider the question presented in this petition to be an important question of federal law.

3. The no opinion affirmance of the Supreme Court of Alabama was not decided in a way that conflicts with relevant decisions of this Court.

As is discussed above, the Court has on no less than three occasions dismissed appeals raising similar claims for want of a substantial federal question. *Bunker,* 460 U.S. 1076; *Ellerbe*, 459 U.S. 802, *reh. denied*, 459 U.S. 1059; *Woodward*, 449 U.S. 807. Those decisions amount to dispositions on the merits. The no opinion affirmance issued by the Supreme Court of Alabama, as characterized by Petitioner, is entirely consistent with those decisions.

If it is assumed *arguendo* that the Supreme Court of Alabama actually "decided" that no due process violation exists in the application of the date of last exposure rule for statute of limitations analysis in Alabama toxic tort cases, such decision does not conflict with any prior decision of this Court. The Court has recognized the importance of statutes of limitations and the role that they play:

> Statutes of limitation are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. . . . there comes a point in time at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious.

Board of Regents of University of State of New York v. Tomanio, 446 U.S. 478, 487 (1980). In addition, the Court

has recognized that "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." *Silver v. Silver*, 280 U.S. 117, 122 (1929). Furthermore, and perhaps most significant to this case, the Court has recognized that "[a] person has no property, no vested interest, in any rule of the common law." *Munn v. Illinois*, 94 U.S. 113, 134 (1877).

Therefore, a state court decision holding that no due process violation occurs when a state provides two years from the date of last exposure in which to file an exposure-related action, rather than two years from the date of discovery of an exposure-related injury, does not conflict with relevant decisions of this Court.

D. There is no manifest injustice resulting from the decision of the Supreme Court of Alabama.

Petitioner invokes "manifest injustice" as an additional claimed basis upon which discretionary review ought to be permitted in this case, portraying her decedent as a victim of what she describes as "perverse rules adopted by the Alabama Supreme Court." Pet. at 26-30. Yet decedent was no more a victim of the rules obtaining in Alabama than plaintiffs in other jurisdictions have been when they have found their causes of action barred by the time that they have been injured or by the time that they have discovered that they have been injured.

The loss of a cause of action to a statute of limitations is not manifest injustice, because "[s]tatutes of limitations. . . . are statutes of repose. . . . [that] protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States v. Kubrick*, 444 U.S. 111, 117

(1979). Indeed, in this case, when decedent sought to litigate the propriety of certain claimed exposures to benzene that had ceased fourteen years earlier, the plant at which the exposures were claimed to have occurred had closed, no records remained to reveal what products had been supplied to or used by decedent, and decedent himself had reported to his treating physician that the substance to which he was exposed was xylene, not benzene. The loss of a cause of action in such circumstances is harsh but not unconstitutional:

> While the statutes are harsh, we cannot agree that they deny due process or equal protection or that they invalidly deprive one of access to the courts in light of policy reasons for the statutes such as avoiding the risk and costs of litigation to manufacturers after a lengthy passage of time.

Alexander v. Beech Aircraft Corp., 952 F.2d 1215, 1225 (10th Cir. 1991). Such statutes promote justice, not injustice. *Order of R.R. Telegraphers v. Ry. Exp. Agency*, 321 U.S. 342, 348-49 (1944). There is no manifest injustice in the refusal of the Supreme Court of Alabama to judicially engraft a discovery rule[20] onto Alabama's two year statute of limitations so as to permit Petitioner to litigate the propriety of her decedent's long ago exposures.

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[20] The Supreme Court of Alabama has specifically refused to judicially adopt such a discovery accrual rule on at least seven occasions since 1979. *See Boyce v. Cassese*, 941 So. 2d 932, 946 n.2 (Ala. 2006); *Payton v. Monsanto Co.*, 802 So. 2d 829, 835 (Ala. 2001); *Travis v. Ziter*, 681 So. 2d 1348, 1354 (Ala. 1996); *American Mut. Liab. Ins. Co. v. Phillips*, 491 So. 2d 904, 906 (Ala. 1986); *Moon v. Harco Drugs, Inc.*, 435 So. 2d 218, 220 (Ala. 1983); *Ramey v. Guyton*, 394 So. 2d 2, 4 (Ala. 1980); *Garrett v. Raytheon Corp., Inc.*, 368 So. 2d 516, 521 (Ala. 1979).

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the petition.

Respectfully submitted,

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and Exxon Mobil Corporation

IN THE CIRCUIT COURT FOR JEFFERSON COUNTY OF THE STATE OF ALABAMA

BESSEMER DIVISION

JACK CLINE,	)	
Plaintiff,	)	
vs.	)	
ASHLAND, INC., BP AMOCO CHEMICAL COMPANY, INC., BP AMOCO CORPORATION, CHEVRON CHEMICAL COMPANY, EXXON MOBIL CORPORATION, HOLMES OIL COMPANY, INC., and THOMPSON & FORMBY COMPANY, AND FICTITIOUS DEFENDANTS WHOSE NAMES ARE UNKNOWN AT THIS TIME BUT WHOSE NAMES WILL BE SUPPLIED BY AMENDMENT WHEN KNOWN, AS DESCRIBED IN ATTACHMENT A HERETO,	)	**CIVIL ACTION NO.**
Defendants.	)	

COMPLAINT

(Filed Apr. 6, 2001)

Comes now, Jack Cline, and show unto this Honorable Court as follows:

BACKGROUND FACTS

1. Beginning in the late 1950's and continuing until recently, Jack Cline, (hereinafter–"Plaintiff"), was employed at the railroad wheel manufacturing plant owned and operated by Griffin Wheel Company and located in the Bessemer Division of Jefferson County and also self-employed as a carpenter in Jefferson County and elsewhere within the State of Alabama. During the course of his career as a chemist and carpenter, Plaintiff worked in various locations (hereinafter the "Exposure Sites") where he came into contact with and was exposed to chemical solvents and other chemical products.

2. As a result of his work-related exposure to chemical solvents and other materials manufactured by Defendants, Plaintiff contracted Acute Myelogenous Leukemia.

3. The defendants herein are companies identified as having produced, manufactured, distributed, sold and/or specified chemical solvents and other chemical products and materials to which Plaintiff was exposed during his employment (the "Defendants").

4. The Defendants in this complaint and which are included in any reference to "Defendants" herein are as follows:

(a) Ashland, Inc., a Kentucky corporation, with principal place of business located at 1409 Winchester Avenue, Ashland, Kentucky;

(b) BP Amoco Chemical Company, a Delaware corporation, with principal place of business located at 511 South Boston Avenue, Tulsa, Oklahoma;

(c) BP Amoco Corporation, an Indiana corporation, with principal place of business located in Indianapolis, Indiana;

(d) Chevron Chemical Company, a Delaware corporation, with principal place of business located in Richmond, California;

(e) Exxon Mobil Corporation, a New Jersey corporation, with principal place of business located in Irving, Texas;

(f) Holmes Oil Company, an Alabama corporation, with principal place of business located in Bessemer, Alabama;

(g) Thompson & Formby, Inc., a Florida corporation, with principal place of business located at 825 Crossover Lane, Memphis, Tennessee, and

(h) Fictitious parties described in Attachment A.

Count One

5. Plaintiffs' initial cause of action is grounded in the Alabama Extended Manufacturer's Liability Doctrine and is stated against the Defendants and fictitious parties in this Complaint.

6. The chemical products and materials produced, manufactured, distributed, sold and/or specified by the Defendants and used in or applied at the Exposure Sites were unreasonably dangerous when applied to their intended use in the usual and customary manner, and the Defendants caused the unreasonably dangerous materials and products to enter the market, as a result of which

Plaintiff was exposed to dangerous chemicals and thereby suffered grave and progressive bodily injuries.

7. The chemical products and materials produced, manufactured, distributed, sold and/or specified by the Defendants and used in or applied at the Exposure Sites were unreasonably dangerous when applied to their intended use in the usual and customary manner in that (a) the chemicals contained in such products and materials are highly carcinogenic and otherwise injurious to the tissue of the human body when inhaled into the respiratory system or ingested into the digestive system and (b) the chemicals contained in such products and materials are known to create or release toxic fumes, which are subject to being readily inhaled or ingested into the respiratory and digestive systems of persons in the vicinity thereof.

8. The Defendants knew or should have known in the exercise of ordinary care and diligence that such products and materials were unreasonably dangerous; nonetheless, the Defendants made no effort to recall their products and materials from any plants, buildings, or machinery, including particularly the locations where Plaintiff was employed. In addition, the Defendants failed to warn the Plaintiff and others similarly situated of the facts concerning the unreasonably dangerous nature of the products and materials which they placed into the stream of commerce. The Defendants thus caused Plaintiff-to be exposed to their hazardous chemical products and materials without warning of the dangers thereof or taking preventative measures to protect the Plaintiff from exposure, as a proximate result of which the Plaintiff was exposed to said products and suffered grave and progressive bodily injury.

Count Two

9. Plaintiff adopts and realleges, as if fully set forth herein, the factual and other averments as set forth above.

10. Defendants produced, manufactured, distributed, and sold chemical products and materials which were used or installed in or applied to the Exposure Sites where Plaintiff was employed.

11. The Defendants impliedly warranted that said chemical products and materials were fit for their intended uses and further warranted that said chemical products and materials were merchantable.

12. The chemical products and materials produced, manufactured, distributed, and/or sold by the Defendants and used or installed in or applied to the Exposure Sites were unreasonably dangerous as applied to their intended use. Therefore, the Defendants breached their implied warranties in that the chemical products and materials are highly carcinogenic and otherwise injurious to the tissue of the human body when inhaled into the respiratory system or ingested into the digestive system, etc.

13. The chemical products and materials distributed by Defendants were not fit for use for their intended purpose; rather, they were unsafe, unfit, and unusable for their intended purposes. The condition of the Defendants' products constituted a breach of Defendants' implied warranty of fitness for a particular purpose and merchantibility. As a result of the Defendants' breach of their implied warranties, the Plaintiff suffered grave and progressive bodily injuries associated with Acute Myelogenous Leukemia, resulting in pain and suffering, medical expenses and other damages.

WHEREFORE, PREMISES CONSIDERED, Plaintiff hereby demands judgment against the defendants with respect to the foregoing Counts hereof in an amount the jury may assess as just, together with such other and further relief as the Court deems proper.

/s/ Mark Rowe
Mark L. Rowe
One of the Attorneys for Plaintiffs

OF COUNSEL:

Environmental Attorneys Group, L.L.C.
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PLAINTIFFS' ADDRESS:
c/o 3529 Seventh Avenue South
Birmingham, Alabama 35222

JURY DEMAND

Plaintiffs demand a trial by struck jury on all issues.

/s/ Mark Rowe
Of Counsel

ATTACHMENT A

The fictitious parties referred to in the Complaint to which this Attachment A is attached are, whether singular or plural, those persons or entities (or that person or entity) who or which are described as follows: Nos. 1 through 10, who or which constructed, manufactured, or produced any hazardous chemical product to which the

Plaintiff was exposed; Nos. 11-20, who or which formulated, manufactured or produced any hazardous chemical product substantially identical to and indistinguishable from any hazardous chemical product to which the Plaintiff was exposed; Nos. 21-30, who or which refined, formulated, manufactured or produced any chemical compound or component which was included in the products and materials produced by the persons or entities referred to as Nos. 1 through 10 or 11 through 20 above; Nos. 31-40, who or which distributed, installed or applied (or specified the installation or application of) the products and materials refined, formulated, manufactured or produced by the persons or entities referred to as Nos. 1 through 10, 11-20, or 21-30 above; Nos. 41-50, who or which occupied, controlled and/or owned Exposure Sites on the premises of which Plaintiff worked; Nos. 51-60, who or which are the alter egos of, predecessors of, successors in interest to or mere continuations of (including any trust or other entity established pursuant to order of any bankruptcy court for the benefit of chemical exposure victims), or entities controlled as mere instrumentalities of, the persons or entities described as Nos. 1 through 60 above; and Nos. 61-70, who or which control or controlled the persons or entities described as Nos. 1 through 60 above as adjuncts or mere instrumentalities.

IN THE CIRCUIT COURT FOR
JEFFERSON COUNTY, ALABAMA

BESSEMER DIVISION

JACK CLINE, Plaintiff, vs. ASHLAND INC,; BP AMOCO CHEMICAL COMPANY, INC; BP AMOCO CORPORATION; CHEVRON CHEMICAL COMPANY; EXXON MOBIL CORPORATION; et al., Defendants.	§ § § § § § § § § § § §	CIVIL ACTION NO. CV-2001-423

ANSWER

Defendants Ashland, Inc., and Exxon Mobil Corporation, answer plaintiffs Complaint as follows:

* * *

FIFTH AFFIRMATIVE DEFENSE

For further answer to the Complaint of the plaintiff, these defendants aver that all of plaintiff's claims are barred by the applicable statutes of limitation.

/s/ W. Craig Hamilton
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CERTIFICATE OF SERVICE

I hereby certify that I have on this day, May 23, 2001, served a copy of the foregoing pleading on the following listed counsel of record by mailing the same by United States mail, properly addressed and first class postage prepaid.

/s/ W. Craig Hamilton

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IN THE CIRCUIT COURT FOR
JEFFERSON COUNTY, ALABAMA

BESSEMER DIVISION

JACK CLINE, Plaintiff, vs. ASHLAND INC,; BP AMOCO CHEMICAL COMPANY, INC; BP AMOCO CORPORATION; CHEVRON CHEMICAL COMPANY; EXXON MOBIL CORPORATION; et al., Defendants.	§ § § § § § § § § § §	CIVIL ACTION NO. CV-2001-423 **ORAL ARGUMENT REQUESTED**

MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS ASHLAND, INC., CHEVRON PHILLIPS CHEMICAL LP, SUCCESSOR IN INTEREST TO CHEVRON CHEMICAL COMPANY, LLC, AND EXXON MOBIL CORPORATION

Defendants Ashland, Inc., Chevron Phillips Chemical LP, successor in interest to Chevron Chemical Company, LLC, and Exxon Mobil Corporation, move the Court, pursuant to Rule 56 of the Alabama Rules of Civil Procedure, for entry of summary judgment in their favor in this matter. In support of this motion, defendants aver that there is no material issue of disputed fact, and that they are each entitled to summary judgment as a matter of law. This motion is based upon the pleadings, the narrative summary of undisputed facts and brief in support of motion for summary judgment filed herewith, and the

evidentiary submission in support of motion for summary judgment also filed herewith.

/s/ George M. Walker
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Defendants respectfully request oral argument on their motion

/s/ George M. Walker

CERTIFICATE OF SERVICE

I hereby certify that I have on this day, August 26, 2002, served a copy of the foregoing pleading on the following listed counsel of record by mailing the same by United States mail, properly addressed and first class postage prepaid.

/s/ George M. Walker

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IN THE CIRCUIT COURT FOR
JEFFERSON COUNTY, ALABAMA
BESSEMER DIVISION

JACK CLINE, Plaintiff, vs. ASHLAND INC,; BP AMOCO CHEMICAL COMPANY, INC; BP AMOCO CORPORATION; CHEVRON CHEMICAL COMPANY; EXXON MOBIL CORPORATION; et al., Defendants.	§ § § § § § § § § § § §	CIVIL ACTION NO. CV-2001-423

NARRATIVE SUMMARY OF UNDISPUTED MATERIAL FACTS AND BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF DEFENDANTS ASHLAND, INC., CHEVRON PHILLIPS CHEMICAL LP, SUCCESSOR IN INTEREST TO CHEVRON CHEMICAL COMPANY, LLC, AND EXXON MOBIL CORPORATION

This is a product liability case. Plaintiff, who suffers from acute myelogenous leukemia, contends that his disease is the product, in whole or in part, of his exposures to benzene in the workplace between 1979 and 1987. Plaintiff did not file his Complaint raising these exposure-related injury claims until April 6, 2001. Under the circumstances, plaintiff's claims against these defendants are barred as a matter of law by the applicable statutes of limitations. Moreover, his warranty claim fails to state a claim for relief permitted under Alabama law. Defendants Ashland, Inc., Chevron Phillips Chemical LP, successor in

interest to Chevron Chemical Company, LLC, and Exxon Mobile Corporation submit this narrative summary and brief in support of their Motion for Summary Judgment.

* * *

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Under Alabama law, a product liability claim arising out of exposure to chemicals must be filed within two years after the last such exposure, or within four years of the tender of delivery of the chemicals. Here, plaintiff brought suit against these defendants **twelve years** after his last claimed exposure to any benzene product supplied by any of them, **six years** after his last possible exposure to any chemicals in the workplace, and **fourteen years** after latest possible tender of delivery of the chemical to which he claims to have been exposed. As discussed below, plaintiff's claims against these defendants are therefore barred as a matter of law.

* * *

CONCLUSION

For the foregoing reasons, the Motion for Summary Judgment of defendants Ashland, Inc., Chevron Phillips Chemical LP, successor in interest to Chevron Chemical Company, LLC, and Exxon Mobil Corporation is due to be granted as a matter of law.

Respectfully submitted,

/s/ George M. Walker
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CERTIFICATE OF SERVICE

I hereby certify that I have on this day, August 26, 2002, served a copy of the foregoing pleading on the following listed counsel of record by mailing the same by

United States mail, properly addressed and first class postage prepaid.

/s/ George M. Walker

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IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
BESSEMER DIVISION

JACK CLINE, Plaintiff,	)	
v.	)	CIVIL ACTION NO. CV 01-423
ASHLAND, INC., et al., Defendants.	)	

PLAINTIFF'S RESPONSE TO DEFENDANTS ASHLAND'S, CHEVRON'S, AND EXXON'S MOTION FOR SUMMARY JUDGMENT

COMES NOW the Plaintiff in the above-styled cause, by and through counsel, and responds to these Defendants' Motion for Summary Judgment as follows:

1. That there are genuine issues of material fact so as to preclude a judgment as a matter of law.

2. This response is based on the attached Memorandum of Law, all of the pleadings to date, all discovery and responses filed to date, the deposition testimony of Jack Cline, and chemical analysis of defendant Thompson & Formby's product, Thompson's Water Seal.

/s/ Mark Rowe
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Oral Argument Not Requested
Unless So Desired by the Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have, on this the 7 day of October, 2002, served the above and foregoing *Plaintiff's Response to Defendants Ashland's, Chevron's, and Exxon's Motion for Summary Judgment* upon counsel of record on the attached service list by placing a true and correct copy thereof into the U.S. Mail, first class postage prepaid.

/s/ Mark Rowe
Of Counsel

**IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
BESSEMER DIVISION**

JACK CLINE, Plaintiff,	)	
v.	)	CIVIL ACTION NO. CV 01-423
ASHLAND, INC., et al., Defendants.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT

I. Discussion of Facts

Plaintiff, Jack Cline, suffers with a form of cancer known as acute myelogenous leukemia; it is often fatal and almost uniquely caused by exposure to benzene. "Clinical reports and epidemiologic studies have repeatedly linked benzene exposure with leukemia, primarily *acute myelogytic* and other types of acute non-lymphocytic leukemia."[1] (italics added).

Without question Cline was exposed to benzene manufactured by these defendants. They are satisfied their benzene product(s) would have been used by Cline, thereby exposing him and seek no issue concerning the identification and use of their benzene products. They state as "an undisputed material fact" that: "He got the

[1] S.N. Yin, et al., A Retrospective Cohort Study of Leukemia and Other Cancers in Benzene Workers. *Environmental Health Perspectives* Vol. 82, 1989. 207.

benzene from 55 gallon barrels, and he specifically remembers using benzene from barrels bearing labels from Ashland, Mobil, Chevron, and Amoco."[2] We agree with this undisputed material fact.

More troubling is the defendants' oft-repeated statement that Cline "has not been exposed to benzene since 1987." Jack Cline has been exposed to benzene and benzene-related derivatives beginning in 1969 continually so into 1999. To claim otherwise ignores Cline's testimony, who thoroughly described his exposure to not only these defendants' benzene, but to another defendant in this case, Thompson & Formby's product as well; Thompson's Water Seal. Cline not only discussed the defendants at issue here, but discussed the history of his continual exposure to benzene from Thompson's Water Seal manufactured by defendant Thompson & Formby.

Q: (by Mr. Miller): Mr. Cline, when do your first recall using Thompson's Water Seal?

A: Well, it was probably around 1969.

Q: And you used it periodically when you were doing work up until when? 1998?

A: '99, the first part of '99 and all before I came down with my cancer.

Thompson's Water Seal contains benzene and benzene derivatives. This significant evidence should not be

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[2] Defendants' brief at 3.

omitted and any claim of exposure that is different is certainly not an "undisputed fact."[3]

II. Plaintiff Cline Filed His Claim Within Two Years of His Last Exposure to Benzene.

Defendants' argument merely recites the general rule that a suit must be brought within two years of the last date of exposure to a harmful substance. They cite three cases for that proposition, each of which are consistent and supportive of the plaintiff in this case. Each case is considered.

A. Garrett v. Raytheon Co., 368 So.2d 516 (Ala. 1979).

The *Garrett* plaintiff, Gary Garrett, claimed exposure to radiation from radar equipment manufactured by one and only one defendant for a period of two years from 1955 to 1957. He did not allege any continuing exposure to radiation beyond those dates. It is the continuing nature of exposure that differs here from *Garrett.* Garrett brought his lawsuit more than 20 years after his last exposure to radiation, unlike Cline, who brings his suit within two years after his last exposure to benzene. Jack Cline's last exposure to benzene was in 1999, consistent with the holding in *Garrett.* The language in *Garrett* that suggests a statute of limitations "began to run when plaintiff was

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[3] Defendants' brief at 3. While worded only slightly different, defendants' brief is replete with this allegation. Jack Cline deposition testimony taken July 9, 2002, at 60. Chemical analysis of Thompson's Water Seal showing high parts per million amounts of benzene and benzene-related derivatives is attached to this Memorandum.

last exposed to radiation" might as easily say that Cline's statute "began to run when [he] was last exposed to "*benzene*". The *Garrett* decision hardly justifies a judgment for these defendants as a matter of law against Jack Cline.

B. Becton v. Rhone-Poulenc, Inc., 706 So.2d 1134 Ala. 1997.

Similarly, there is little comfort for these defendants in the *Becton* decision. There, the plaintiff was exposed to an admitted teratogen, which the defendants here correctly point out is in the same chemical family as benzene, demonstrating the potent carcinogenic reach of benzene and its derivatives. Despite this defendant's characterization to the contrary, this is the only "strikingly similar fact" to Cline's benzene exposure. Beyond that, the case is quite dissimilar.[4]

Becton's last exposure to a benzene-related chemical was almost nine (9) years before he filed suit; plaintiff Jack Cline's last exposure to benzene itself was within two years of his lawsuit. Most importantly, in *Becton,* plaintiff's response to the statute of limitations defense was to assert that a discovery statute was "federally mandated" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The Court then entered into a lengthy discussion of federalism in relationship to CERCLA. We make no such claim here. Alabama, to state perhaps overly generally, follows the last date of exposure rule and we do not argue otherwise.

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[4] Defendants' brief at footnote 6 at 7; defendants' brief at 7. Similar carcinogenic chemicals in the same chemical family, is the only "strikingly similar fact" between *Becton* and *Cline*.

The only relevant language found in *Becton* simply restates the general rule on the last date of exposure. For purposes of an action based on continuous exposure to a hazardous substance, the date of the injury is the date on which plaintiff was last exposed to the hazardous substance causing the injury." *Becton* at 706. Here the "hazardous substance causing the injury" is benzene, to which Jack Cline was exposed last within two years of filing his claim. We are consistent with the broad rule outlined in *Becton* and assuredly do not argue that CERCLA federally mandates a discovery rule. The *Becton* decision offers no succor to these defendants for the harsh result they seek.

C. **Hillis v. Rentokil, Inc.**, 596 So.2d 888, Ala. 1992.

Equally unrelated is the *Hillis* decision. It is curious that the defendant in *Hillis* actually argued that Alabama should adopt a discovery rule for statute of limitations purposes, because Hillis was aware of his injuries earlier than his last date of exposure. The defendant here strenuously argues, as did the plaintiff in *Hillis,* that it is the last date of exposure rather than a discovery rule that governs the statute of limitations. Plaintiff Hillis filed his complaint, as has Cline, within the last two years of his exposure. It is difficult to understand how the *Hillis* decision helps the defendants here.

It is clear that Cline filed his lawsuit within two years of his last date of exposure to benzene and is consistent with all of the cases cited by these defendants.

III. There is No Different Statute of Limitations for This Defendant.

So clearly has Cline filed his suit within two years of his last exposure that it is difficult to discern how this defendant would justify escaping liability with what they have presented to the Court. While never argued directly, there is an oblique reference by this defendant that hints at perhaps their true argument. They mention in passing that Cline failed to file a claim within two years of his exposure "to any benzene that may have been supplied by these defendants."[5]

If indeed this be their true argument, they should say so in a fully cited and reasoned brief rather than some glancing throw-away line at the end of a largely irrelevant brief. Their reluctance to do so must necessarily stem from the realization that such a conclusion is not only counter-initiative but also not the law in Alabama.

All the defendants in this case are concurrent tortfeasors, and as such are equally liable for the entire injury suffered by Jack Cline. In other words, they are all equally liable for the one injury that the plaintiff sustained. This is the conclusion found in the *Garrett* decision. *Garrett* explained that the "date of injury" for statute of limitations purposes is the "day on which the plaintiff was last exposed to the damages which injured her." *Garrett* at 520. Therefore, in a case involving a continuing exposure, such as a benzene exposure case, the actions cannot accrue under the last date of exposure statute of limitations as long as the person is still being exposed to the "hazardous substance." The Court clearly reasoned in *Garrett* that the

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[5] Defendant's brief at 9.

date of injury for statute of limitations purposes is the day on which the plaintiff was last exposed. Until that date, the plaintiff does not have an injury for which the statute of limitations would begin to run.

Thus, the statute of limitations could not begin to run on any claims against some of the defendants or any of their concurrent tortfeasors until every action which contributed to Cline's injury had occurred. Accepting the defendants' apparent argument would lead to the astounding conclusion that a different statute of limitations would apply to concurrent tortfeasors who together caused one injury through a continuing tort simply based on the last date of exposure to that particular defendant's product. That reasoning could have the potential effect of forcing a minor defendant whose product exposed the plaintiff much later being held responsible for the plaintiff's entire injury. That is not the law in Alabama, and none of the cases cited by this defendant have reached that conclusion.

Consistent with the law in Alabama, plaintiff Jack Cline filed his lawsuit within two years from the date of his last exposure to these concurrent tortfeasors' benzene. These defendants' Motion for Summary Judgment based on the statute of limitations on the plaintiff's AMELD claim is due to be denied.

/s/ Mark Rowe
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Oral Argument Not Requested
Unless So Desired by the Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have, on this the 7 day of October, 2002, served the above and foregoing *Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment* upon counsel of record on the attached service list by placing a true and correct copy thereof into the U.S. Mail, first class postage prepaid.

/s/ Mark Rowe
Of Counsel

CV 2001 00423.00
JUDGE: DAN C. KING III

ALABAMA JUDICIAL DATA CENTER
CASE ACTION SUMMARY CONTINUATION
CIRCUIT CIVIL

IN THE CIRCUIT COURT OF JEFF-BESMR COUNTY

JACK CLINE VS ASHLAND INC., ET AL
FILED: 04/06/2001 TYPE: PRODUCTS LIABILITY
TYPE TRIAL: JURY TRACK:

* *

DATE 1: CA: CA DATE:
DATE 2: AMT: $00 PAYMENT:

* *

* * *

1/14/03 Motion for Summary Judgment on Behalf of Defendants Ashland, Inc, Chevron Phillips Chemical LP Successor in Interest of Chevron Chemical Company LLC and Exxon Mobil Company is denied. Holmes Oil Company motion for summary judgment is denied. The Breach of Warranty counts in the complaint are granted by agreement of the parties and are dismissed.

This case is set Sept. 8, 2003 #4

/s/ Dan C. King III Judge

1/29/03 attys notified via fax (ls)

IN THE CIRCUIT COURT FOR
JEFFERSON COUNTY, ALABAMA
BESSEMER DIVISION

JACK CLINE, Plaintiff, vs. ASHLAND, INC,; BP AMOCO CHEMICAL COMPANY, INC; BP AMOCO CORPORATION; CHEVRON CHEMICAL COMPANY; EXXON MOBIL CORPORATION; et al., Defendants.	§ § § § § § § § § § §	CIVIL ACTION NO. CV-2001-423 **ORAL ARGUMENT REQUESTED**

MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS ASHLAND, INC., CHEVRON PHILLIPS CHEMICAL LP, SUCCESSOR IN INTEREST TO CHEVRON CHEMICAL COMPANY, LLC, AND EXXON MOBIL CORPORATION

Defendants Ashland, Inc., Chevron Phillips Chemical LP, successor in interest to Chevron Chemical Company, LLC, and Exxon Mobil Corporation, move the Court, pursuant to Rule 56 of the Alabama Rules of Civil Procedure, for entry of an order granting summary judgment in their favor on each and every claim made against them by plaintiff. In support of this motion, defendants aver that there is no material issue of disputed fact, and that they are entitled to summary judgment as a matter of law for any or all of the following reasons:

1. Plaintiff's claims against these defendants are barred by the applicable statutes of limitation.

2. Plaintiff cannot demonstrate by substantial evidence that he experienced any substantial exposure to benzene.

3. Plaintiff cannot establish by substantial evidence that he was exposed to any benzene produced or supplied by any of these defendants.

4. Plaintiff cannot establish by substantial evidence that any of these defendants supplied benzene that was in a defective or unreasonably dangerous condition.

5. Plaintiff cannot produce substantial evidence that low level exposures to benzene of the type he allegedly experienced are associated with the production of acute myelogenous leukemia in humans.

6. Plaintiff cannot produce substantial evidence that his disease, to any degree of medical certainty, most probably resulted from exposures to benzene.

This motion is based upon the pleadings, the narrative summary of undisputed facts and brief in support of motion for summary judgment filed contemporaneously herewith, and the evidentiary submission in support of motion for summary judgment also filed contemporaneously herewith.

WHEREFORE, defendants request that the Court enter an order granting summary judgment in their favor.

/s/ George M. Walker
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Defendants respectfully request oral argument on their motion

/s/ George M. Walker

CERTIFICATE OF SERVICE

I hereby certify that I have on this day, January 8, 2004, served a copy of the foregoing pleading on the following listed counsel of record by mailing the same by United States mail, properly addressed and first class postage prepaid.

/s/ George M. Walker

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IN THE CIRCUIT COURT
OF JEFFERSON COUNTY, ALABAMA
BESSEMER DIVISION

JACK CLINE, Plaintiff, v. ASHLAND, INC., et al., Defendants.	)	CIVIL ACTION NO. CV 01-423

PLAINTIFF'S REPLY BRIEF IN OPPOSITION TO DEFENDANTS ASHLAND, INC., CHEVRON PHILLIPS CHEMICAL LP, SUCCESSOR IN INTEREST TO CHEVRON CHEMICAL COMPANY, LLC, EXXONMOBIL CORPORATION, AND BP AMOCO CHEMICAL COMPANY, SUCCESSOR IN INTEREST TO AMOCO CORPORATION AND STANDARD OIL COMPANY, SHERWIN WILLIAMS COMPANY AND HOLMES OIL COMPANY'S MOTION FOR SUMMARY JUDGMENT

The Plaintiff, Jack Edward Cline, by and through its counsel and, pursuant to Rule 56(b) of the Alabama Rules of Civil Procedure, seeks denial of the summary judgment motion filed by Defendants where there are genuine issues of material facts and these Defendants are not entitled to judgment as a matter of law.

NARRATIVE SUMMARY OF UNDISPUTED FACTS AS READ AND INTERPRETED BY THE PLAINTIFF

The Plaintiff, Jack Edward Cline, filed suit against the named Defendants as manufacturers, suppliers, and/or

distributors of benzene and/or benzene-containing products after he was diagnosed with Acute Myelogenous Leukemia ("AML"). This condition is unequivocally known to be caused by benzene. Mr. Cline's AML developed after several years of exposure to defendant's benzene where these products were delivered and used by Mr. Cline and his coworkers as a cleaning solvent at Griffin Wheel, a wheel manufacturing facility located in Bessemer, Alabama. Mr. Cline's exposure to benzene began approximately in 1968 when the Griffin facility began to utilize a chemical analysis device called a "spectrometer." ("Exh. I", Plaintiff's dep. p. 88, lines 1-23). This exposure to benzene at Griffin lasted through 1986 or 1987 when his job responsibilities began to change. ("Exh. 2," Plaintiff's dep. p. 89 lines 8-23). However, his exposure to benzene continued for several years after leaving Griffin Wheel.

Mr. Cline also the used of Thompson's Water-seal, a chemical used as a water-proofing agent for wood and other similar materials. Thompson's Water-seal is a trademark name owned by The Sherwin-Williams Company, also a defendant party in this lawsuit. Mr. Cline believes that his AML was also caused by this product since this product was used in his business and for personal applications around his home. Thompson's Water-seal, through chemical analysis, has been shown to contain benzene and other petroleum-based constituents likely to induce cancer as well. ("Exh. 3," analysis report). Mr. Cline used this product from the early 1970's through late 1999 on several construction projects and continued to use this product just prior to his discovery of his AML, the condition that lead him to file this lawsuit.

PLAINTIFF CAN DEMONSTRATE GENUINE ISSUES OF MATERIAL FACTS

Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party bears the burden of showing that there is no issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553-54, 91 L. Ed. 2d 265 (1986). In support of their motion for summary judgment, defendants address five issues in support of their motion. However, there are essentially three realistically before the court:

Issue I

Whether Jack Cline's claims against these defendants are barred by the applicable statues of limitation;

Issue II

Whether Jack Cline can demonstrate by substantial evidence that he experienced any substantial exposure to benzene to cause his condition, Acute Myelogenous Leukemia ("AML"); and

Issue III

Whether Jack Cline can establish by substantial evidence that he was exposed to benzene supplied by the named Defendants that was in a defective or unreasonably dangerous condition.

With the exception of issue I, "Yes" is essentially the answer to all issues raised by the Defendants. However,

for the purpose of offering evidence to support denial of this motion, all responses are addressed accordingly.

I. THIS COURT HAS ALREADY RULED IN FAVOR OF THE PLAINTIFF WHERE THE DEFENDANT ALLEGED NON-COMPLIANCE WITH ALABAMA'S TWO-YEARS-FROM-LAST-EXPOSURE RULE

This court has already addressed this issue. The Defendants claim was denied before and nothing is presented here bring into disrepute the decision already granted by this very court. Reconsidering this issue yet again amounts to collateral estoppel. Denial again is in order.

* * *

IV. ALL SUMMARY JUDGMENT MOTIONS ARE DUE TO BE DENIED

The principles of law applicable to a motion for summary judgment are well settled. To grant such a motion, the trial court must determine that the evidence does not raise a genuine issue of material fact and that the movant is entitled to a judgment as a matter of law. Rule 56(c)(3), Ala.R.Civ.P. When the movant makes a prima facie showing that those two conditions are satisfied, the burden shifts to the nonmovant to present substantial evidence creating a genuine issue of material fact. *Bass v. SouthTrust Bank of Baldwin County,* 538 So.2d 794, 797-98 (Ala. 1989). Evidence is "substantial" if it is of "such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." *West v. Founders Life Assurance Co. of Florida,* 547 So.2d 870, 871 (Ala. 1989). The evidence

submitted in support of these claims made by Jack Cline against these Defendants are more than significant to encourage this court to deny this motion and allow a jury to determine the rights of Mr. Cline, who continues to battle this chemically-induced condition.

/s/ Gregory A. Cade
Gregory A. Cade,
State Court ID No. CAD010
Mark L Rowe,
State Court ID No. ROW003
2120 16th Avenue South,
Suite 100
Birmingham, Alabama 35205
Telephone: 205-212-9995
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ATTORNEYS FOR THE PLAINTIFF

Of Counsel
Dan Reynolds
510 North 18th Street
Bessemer, AL 35020
205-425-7001

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have, on this the 21st day of June, 2004, served the above and foregoing *Plaintiff's Reply Brief in Opposition to Defendants Ashland, Inc., Chevron Phillips Chemical LP, Successor in Interest to Chevron Chemical Company, LLC, Exxonmobil Corporation, and BP Amoco Chemical Company, Successor in Interest to Amoco Corporation and Standard Oil Company, Sherwin Williams Company and Holmes Oil Company's Motion for Summary Judgment* upon counsel of record on

the attached service list by placing a true and correct copy thereof into the U.S. Mail, first class postage prepaid.

/s/ Gregory A. Cade
Of Counsel

NOTICE OF APPEAL TO THE
(Check appropriate block)

☒ **SUPREME COURT OF ALABAMA**
☐ **COURT OF CIVIL APPEALS OF ALABAMA**

State of Alabama **Unified Judicial System** **Form ARAP-1 (front) Rev. 1/97**	**Civil Action Number:** CV-01-423

IN THE CIRCUIT COURT OF JEFFERSON, BESSEMER DIV. **COUNTY, ALABAMA**

APPELLANT JACK CLINE
v. APPELLEE ASHLAND, INC., CHEVRON PHILLIPS CHEMICAL LP, EXXON MOBILE CORP.
TRIAL JUDGE DAN C. KING, III

DATE OF JUDGMENT:	**DATE OF POST-JUDGMENT ORDER:** 3-8-05

NOTICE IS HEREBY GIVEN THAT JACK CLINE appeal(s) to the above-named court from the ☐ Final Judgment ☒ Order On Motion for Summary Judgment (describing it) entered in this cause.

CHECK THE PROPER DESCRIPTION OF THE APPEALED CASE UNDER THE APPROPRIATE COURT:

SUPREME COURT

1. ☒ Summary Judgment, amount claimed more than $50,000
2. ☐ Judgment Amount exceeds $50,000
3. ☐ Amount Sought in trial court more than $50,000, judgment for defendant
4. ☐ Equitable Relief, except for domestic relations
5. ☐ Other: _____

COURT OF CIVIL APPEALS

1. ☐ Summary Judgment, amount claimed $50,000 or less
2. ☐ Judgment Amount $50,000 or less
3. ☐ Amount Sought $50,000 or less, judgment for defendant
4. ☐ Workman's Compensation
5. ☐ Domestic Relations
6. ☐ Other: _____

APPELLANT FILES WITH THIS NOTICE OF APPEAL:

1. ☒ Security for costs of appeal
2. ☐ A supersedeas bond in the amount of $ _____
3. ☐ Deposited cash security in the amount of $ _____
4. ☑ Is exempted by law from giving security for costs of appeal by virtue of ___ _____

Filed 4-15-05 (Date)

2120-16th Ave. So. Ste. 100, Birmingham (Address)
AL 35205 205-212-9995
Telephone Number

CERTIFIED AS A TRUE COPY

/s/ Earl N. Carter, J.
Circuit Clerk

/s/ Mark A. Rowe
Appellant or Attorney for Appellant

SECURITY FOR COSTS

We hereby acknowledge ourselves security for costs of appeal. For the payment of all costs secured by this undertaking, we hereby waive our right of exemption as to personal property under the Constitution and laws of the State of Alabama.

Executed with our seals this 15th day of April, 2005.

Filed and approved:
4-19-05 (Date)

/s/ Jack Cline by Mark Rowe Mark Rowe (L.S.)
Appellant-principal

/s/ Mark Rowe (L.S.)
Surety

/s/ Earl N. Carter, J.
Circuit Clerk
(Amended November 9, 1976; October 1, 1991.)

(L.S.)
Surety

SUPERSEDEAS BOND

We, the undersigned principal and sureties, hereby acknowledge ourselves bound unto _____ in the sum of _____ Dollars, for the payment of which we bind ourselves, and each other, our heirs, executors, [(for amount of bond see Rule 8(a))] and administrators, jointly and severally, and as part of this undertaking we hereby waive our rights of exemption as to personal property under the Constitution and laws of the State of Alabama.

WHEREAS, the above-named appellee(s) recovered a judgment against appellant(s) for the sum of _____ Dollars (and the further acts or duty ____ _____) and [describing judgment in addition to or other than for

money only] _____ Dollars, the costs in that behalf expended.

NOW, therefore, the condition of the foregoing obligation is such that, if the appellant shall prosecute this appeal to effect, and satisfy such judgment, penalties, and costs, including costs of appeal as may be rendered in this case, then the said obligation to be null and void, otherwise to remain in full force and effect.

Executed with our seals this _____ day of _____, _____.

Filed and approved:

_____ (Date)

_____ (L.S.)
Appellant-Principal

_____ (L.S.)
Surety

_____
Circuit Clerk

_____ (L.S.)
Surety

EXECUTION OF JUDGMENT STAYED:

Bond fixed at: $ _____
(Not required for money judgment only.)

_____ _____
Circuit Judge

DESIGNATION OF RECORD ON APPEAL

DESIGNATION OF CLERK'S RECORD: Appellant requests the clerk of include the following checked materials in the clerk's record:

1. ☒ Complaint 2 ☒ Answer 3. ☐ Courterclaim 4. ☐ Cross-Claim 5. ☐ Third-party Complaint 6. ☐ Third-party Answer 7. ☐ Motion to dismiss 8. ☐ Pretrial order	9. ☒ Entire record (less those items set forth in Rule 10(a)) 10. ☒ Motion for summary judgment 11. ☒ Opposition to motion for summary judgment 12. ☒ Final (Judgment) (Order) 13. ☐ Motion for New Trial 14. ☒ Ruling on Motion 15. ☐ Others: _____ 16. ☐ Exhibit Number: _____

TRANSCRIPT STATUS

☒ Transcript will not be ordered. [See Rule 10(b), ARAP.]

☐ Transcript will be ordered. [See Rules 10(b)(2) and 11(a)(2), ARAP, Form 1A or 1B.] Court reporter(s):

_____

_____

_____

NOTE: If more than one court reporter was involved in this case, you must file a Transcript Purchase Order Form in compliance with Rules 10(b) and 11(c), Form 1A or 1B of the ARAP, for *each* court reporter.
(Amended October 1, 1991.)

CERTIFICATE OF FILING

I certify that I have this date filed with the clerk of the trial court the original and 4 copies of the foregoing notice of appeal (along with $100 docket fee), and such other instruments as have been completed and included herein. A true copy of each of these items will be served by the clerk of the trial court on each of the following:

1) Clerk of the appellate court, (the $100 docket fee shall be transmitted with this filing).

2) Court Reporter.

3) Counsel for appellee, or appellee if no counsel.

   Name: Mark Rowe, 2120-16th Ave. So. Ste. 100, Birmingham, AL 35205

   Address: _____

DATED this 15th day of April, 2005.

/s/ Mark Rowe
Attorney for Appellant

(Amended October 1, 1991.)

DOCKETING STATEMENT
Appeal to the Supreme Court of Alabama

NOTE: Completed Civil Case Cover Sheet must be attached.

State of Alabama Unified Judicial System **Form ARAP-24 (front) Rev. 1/97**	**Supreme Court Case Number:** *(To be filled in by Supreme Court)*

COUNTY	**CIVIL ACTION NUMBER**	**TRIAL JUDGE**
Jefferson Bessermer Div.	CV-01-423	Dan C. King, III

I. PARTY/PARTIES FILING APPEAL (Appellant): Jack Cline

APPELLANT'S ATTORNEY: Mark Rowe, Gregory Cade
(205) 212-9995
Telephone Number

2120-16th Ave. So. Ste 100, Birmingham AL 35205
Address *City* *State* *Zip Code*

II. PARTY/PARTIES APPEALED AGAINST (Appellee): Ashland, Inc., Chevron Phillips Chemical, LP, Exxon Mobile Corp.

APPELLEE'S ATTORNEY: George M. Walker
(251) 432-5511
Telephone Number

3000 AMS South Bank Bldg, Mobile, AL 36601
Address *City* *State* *Zip Code*

III. APPELLANT IS THE TRIAL COURT:
☒ Plaintiff ☐ Defendant ☐ Other

IV. IS THIS A CROSS-APPEAL? ☐ Yes ☒ No

V. RELIEF AWARDED/REQUESTED:
Please check the appropriate block(s):

A. X Monetary damages were either sought or awarded, as set out below:

1. Compensatory damages were:
   (a) ☐ awarded in the amount of $ _____;
   (b) ☐ not awarded, but sought in the amount of $ _____;
   (c) ☐ sought, but not awarded – the amount sought was not specified in the complaint.

2. Punitive damages were:
   (a) ☐ awarded in the amount of $ _____;
   (b) ☐ not awarded, but sought in the amount of $ _____;
   (c) ☐ sought, but not awarded – the amount sought was not specified in the complaint.

3. A general award of damages (not differentiating between compensatory and punitive) was:
   (a) ☐ made in the amount of $ _____;
   (b) ☐ not made, but sought in the amount of $ _____;
   (c) ☒ sought, but not made – the amount sought was not specified in the complaint.

4. Other monetary damages (*Type*: _____ _____) were:

   (a) ☐ awarded in the amount of $ _____;
   (b) ☐ not awarded, but sought in the amount of $ _____;
   (c) ☐ sought, but not awarded – the amount sought was not specified in the complaint.

5. Was there a remittitur or additur at issue in the trial court? ☐ Yes ☐ No
   (*If yes, please provide the details in the "FACTS" section on the back of this form.*)

B. ___ Equitable and/or declaratory relief was sought in the trial court.

C. ___ Other
(*Please provide the details of the issue(s) before the Court in the "ISSUES" section on the back of this form.*)

VI. TYPE OF JUDGMENT OR ORDER APPEALED. (Please check one):

A ☐ Judgment based on a Jury Verdict
B ☐ Judgment based on a Non-Jury Decision
C ☐ Judgment Notwithstanding the Verdict (JNOV)
D ☐ Order granting a New Trial
E ☐ Judgment as a Matter of Law
F ☒ Summary Judgment
G ☐ Dismissal
H ☐ Default Judgment
I ☐ Other

VII. IF THIS CASE WENT TO TRAIL, HOW MANY DAYS DID THE TRIAL TAKE? _____

VIII. FINALITY OF JUDGMENT: Date of entry of judgment or order appealed from: 3 (Month) 08 (Day) 05 (Year)

1. Is the judgment or order appealed from in compliance with Rule 58, A.R.Civ.P.?	☒ Yes	☐ No
2. Does the order appealed from constitute a disposition of all claims as to all parties?	☒ Yes	☐ No
3. If not, did the trial court enter an order intended to make the order final pursuant to Rule 54(b)?	☐ Yes	☒ No
4. If the trial court intended to make the order appealed from final pursuant to rule 54(b), did the court in the Rule 54(b) order expressly determine that there was no just reason for delay and expressly direct that final judgment be entered?	☐ Yes	☒ No

5. If the answer to question 2 is "NO," and the trial court did not make the order final by full compliance with Rule 54(b), please explain the basis for seeking appellate review and cite the authority for this appeal:

_____

_____

IX. POST-JUDGMENT MOTIONS: List all post-judgment motions by date of filing, type, and date of disposition (whether by trial court order or by the provisions of Rule 59 1, A.R.Civ.P.):

DATE OF FILING			TYPE OF POST-JUDGMENT MOTION	DATE OF DISPOSITION		
Month	Day	Year		Month	Day	Year
			NONE			

X. CONSTITUTIONAL ISSUES:

1. Are the provisions of Rule 44, A.R.App.P., applicable to this appeal? ☐ Yes ☒ No
2. If so, have the provisions been complied with? ☐ Yes ☐ No

XI. NATURE OF CASE ON APPEAL: In the left column of boxes preceding the categories listed below, check the box (*check only one*) that best describes or categorizes the basis or theory of the primary issue on appeal. In the right column of boxes, check any secondary theories that are applicable to the suit.

TORTS:

01 ☐☐ Bad Faith
02 ☐☐ Fraud
03 ☐☐ Legal Malpractice
04 ☐☐ Medical Malpractice
05 ☐☐ Other Malpractice
06 ☒☐ Products/AEMLD

07 ☐☐ Negligence (Vehicular)
08 ☐☒ Negligence (General/Other)
09 ☐☐ Personal Property
10 ☐☐ Real Property
11 ☐☐ Wrongful Death (All Types)
12 ☐☒ Wantonness
13 ☐☐ Conversion
14 ☐☐ Wrongful Employ. Termination
15 ☐☐ Premises Liability
16 ☐☐ Outrage
29 ☐☐ Other: _____

CONTRACTS:

30 ☐☐ Commercial
31 ☐☐ Personal
32 ☐☐ Pension
33 ☐☐ Insurance
34 ☐☐ Employment
39 ☐☐ Other: _____

OTHER:

40 ☐☐ Real Property
41 ☐☐ Civil Rights (Prisoner)
42 ☐☐ Civil Rights (Other)
43 ☐☐ Wills/Trusts/Estates
44 ☐☐ Declaratory Judgment
45 ☐☐ Injunction (Commercial)
46 ☐☐ Injunction (Employment)
47 ☐☐ Injunction (Other)
48 ☐☐ Extraordinary Writ
49 ☐☐ Pub. Service Comm
50 ☐☐ RR/Seaman (FELA)

51 ☐☐ RICO

99 ☐☐ Other: _____

XII. **APPELLATE REVIEW:** Please take notice that your case may be initially reviewed by the Court of Civil Appeals. Pursuant to § 12-2-7, *Code of Alabama* 1975, the Supreme Court has the authority to transfer any civil case within its jurisdiction to the Court of Civil Appeals, except cases presenting a substantial question of federal or state constitutional law; cases involving a novel legal question, the resolution of which will have significant statewide impact; utility rate cases appealed pursuant to § 37-1-140, *Code of Alabama 1975*; bond validation cases appealed pursuant to § 6-6-754, *Code of Alabama 1975*; or Alabama State Bar disciplinary proceedings.

If you believe this case should not be transferred to the Court of Civil Appeals, please state with specificity the reason(s) why it should ***not*** be transferred, referring to pertinent sections of § 12-2-7. Reasons should be supported in the ISSUES and FACTS sections of this docketing statement.

_____

_____

_____

XIII. **ISSUES:** Briefly summarize the issue(s) on appeal.

In an AEMLD Personal Injury Action for injury caused by exposure to a toxic substance, does the Statute of Limitations accrue against all joint tortfeasors upon the plaintiff's last exposure to the toxic substance?

XIV. FACTS: Without argument, briefly summarize the facts to inform the court of the nature of the case.

The plaintiff/appellant developed acute myelogenous leukemia ("AML") as a proximate result of his continuous exposure to benzene over the course of many years, including exposure to pure benzene manufactured and/or supplied by the defendants/appellees, Ashland, Inc., Chevron Phillips Chemical LP, and Exxon Mobil Corp. The plaintiff/appellant's exposure to benzene manufactured and/or supplied by the defendants/appellees occurred while he was employed as a plant chemist for Griffin Wheel Co. in Bessemer from about 1968 through about 1987. However, from the 1970's through about 2000, the plaintiff/appellant was also exposed to benzene contained in a product known as "Thompson's Water Seal," which was manufactured and/or supplied by Thompson & Formby Co., a former defendant in the case. In 2001 the plaintiff/appellant was first diagnosed with AML and in the same year filed this AEMLD personal injury action against the defendants/appellees and others, including former defendant Thompson & Formby Co.

April 15, 05 /s/ Mark Rowe

Date **Signature of Attorney/ Party Filing this Form**

55

(3)

No. 06-1329

FILED
MAY 11 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

MARTHA JANE CLINE, Executrix of the Estate of Jackie Edward Cline,

Petitioner,

v.

ASHLAND, INC., et al.,

Respondents.

On Petition For A Writ Of *Certiorari* From The Supreme Court Of Alabama

PETITIONER'S REPLY BRIEF

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OR CALL COLLECT (402) 342-2831

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PETITIONER'S REPLY BRIEF

A. THE FEDERAL QUESTION IN THIS CASE WAS PROPERLY PRESENTED TO THE ALABAMA SUPREME COURT.

1. Respondents' central argument is that review should be denied because the federal question in this case – whether the lower court's holding violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution – was not properly presented to the Alabama Supreme Court. *See* Opposition at 5-15. As previously explained, however, the federal due process question *was* fully presented to the Alabama Supreme Court, both in the initial round of briefing and upon rehearing. *See* App. 70-106 (excerpts from briefs below). Notably, in these two rounds of briefing, respondents never argued that this issue was not properly presented to the Alabama Supreme Court. Rather, they responded fully on the merits, arguing that the Alabama Supreme Court's interpretation of its statute of limitations did not violate either federal or state due process. *See* App. 81-85, 100-06. Thus, if anyone has waived an argument, it is respondents by arguing the due process issue over the course of many briefs without once suggesting that petitioner had forfeited it. *See Waddell & Reed, Inc. v. United Investors Life Ins. Co.*, 875 So.2d 1143, 1167 (Ala. 2003) ("Issues not raised in a party's brief are waived.").[1]

---

[1] *Accord Engel v. Isaac*, 456 U.S. 107, 125 n.26 (1981) (declining to consider petitioner's claim that government waived an argument because petitioner's waiver argument had itself been waived); *Geva v. Leo Burnett Co.*, 931 F.2d 1220, 1225 (7th Cir. 1991) (considering defendant's claim of waiver to be waived); *Wilson v. Attaway*, 757 F.2d 1227, 1247 (11th Cir. 1985) (plaintiff's assertion that qualified immunity had been waived came too late and was itself waived).

2. Respondents' fall-back position is that the Alabama Supreme Court lacked jurisdiction to decide the federal due process question because it was not properly raised in the trial court. *See* Opposition at 12-13. This argument is also in error. First, the federal due process issue *was* presented to the trial court, in the form of an *amicus* brief that was filed at the request of Mr. Cline's then-counsel and with the explicit permission of the trial court (*see* App. at 56-69) – facts that respondents do not contest.[2]

Moreover, even if the issue had not been presented to the trial court, that would not have deprived the Alabama Supreme Court of jurisdiction to consider the issue. For almost a century, Alabama appellate courts repeatedly have held that they possess the jurisdiction to consider issues not raised in the trial court, particularly in cases involving important issues of public policy.[3]

---

[2] Respondents do complain that the *amicus* brief was never served upon the Attorney General of the State of Alabama, "as is required by Alabama law when a party challenges the constitutionality of a statute." Opposition at 3 (citation omitted). This argument is wrong because service upon the Attorney General is only required on a challenge to a statute, municipal ordinance, or franchise. *See* ALA. CODE § 6-6-227 (1975). Petitioner's decedent never asserted that any statute is unconstitutional, but rather that the court-created accrual rule denied Mr. Cline due process of law. Thus, he was not required by Alabama Code § 6-6-227 to join the Attorney General in the trial court. *See Williams v. Alabama Power Co.*, 730 So.2d 172, 174 n.2 (Ala. 1999).

[3] For example, in *Williams*, 730 So.2d at 173, the "only issue before the circuit court was the amount of 'just compensation' Williams [the appellant] should receive for the easement across his land." It was only on appeal to the Alabama Supreme Court that the plaintiff raised a constitutional issue, arguing that "the state and federal constitutions require that 'just compensation' be paid for property condemned in an eminent domain proceeding. . . . " *Id.* Even though the constitutional

(Continued on following page)

Nor is there any question that the court below actually considered the due process implications of its ruling. Although the majority was silent on this issue (and all others), two of the accompanying decisions mention due process. *See* App. 5-6 (See, J., concurring specially) (discussing state due process); App. 36-37 (Harwood, J., dissenting) (same). That neither of these decisions explicitly mentions *federal* due process is irrelevant, because it is well-established that this Court possesses jurisdiction to review a state court judgment where the state court's refusal to deal with a federal question is a mere evasion of the Court's jurisdiction. *See* Robert L. Stern et al., SUPREME COURT PRACTICE, § 3.18, at 178 (8th ed. 2002) (citing *Rogers v. Alabama*, 192 U.S. 226, 230-31 (1904)). *See also id.* at 176 ("[S]tate court's refusal or failure to articulate its denial of the federal claim is just as reviewable as an express decision on the point.").

3. Respondents' final procedural argument is that review should be denied because the Alabama Supreme Court's ruling may have rested on one of the substantive grounds raised by respondents in support of their summary judgment motion. *See* Opposition at 14-15. This

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issue was not raised below, the Alabama Supreme Court took the issue under consideration. *Id.*; *see also Knox v. Dillard*, 72 So.2d 56, 60 (Ala. 1916) ("[Where] the determination by this court of questions involving matters of public concern cannot be had without the consideration and decision of the constitutional validity of enactments, this court must, in the discharge of its grave duty in that regard, take account of such questions, whether raised or argued in the lower courts or not. . . .") (McClellan, J., dissenting); *All South Bonding Co., Inc. v. Alabama*, 496 So.2d 786, 787 (Ala. Civ. App. 1986) ("The constitutional issue was never presented to the trial court, and it is therefore not usually available for argument on appeal . . . *however, we have considered it and find it not convincing*.") (emphasis added).

argument is easily laid to rest. Although the majority did not write an opinion in this case, the three accompanying opinions make no mention of any of the substantive arguments raised by respondents at the trial court level. *See* App. 2-48. The dissenting opinion further makes clear that, given the trial court's focus on the statute of limitations issue, petitioner intentionally "forwent" developing a full evidentiary record on the causation issues raised by respondents, and that all parties to the case always understood that "the planned appeal would focus solely on [the] statute of limitations issue." App. 43. Indeed, by order dated March 21, 2006, the Alabama Supreme Court *limited oral argument to the statute of limitations issue presented in the case*. In light of these facts, respondents' contention that the majority's decision may have rested on an independent and adequate state ground falls flat.

B. RESPONDENTS' SUBSTANTIVE ARGUMENTS AGAINST REVIEW LACK MERIT.

1. All of respondents' substantive arguments against review hinge on a single proposition of law: that, contrary to petitioner's contentions, Mr. Cline *could* have filed a lawsuit within two years of his exposure to benzene. *See* Opposition at 16-17. Based on this statement of Alabama law, respondents argue that this case does not present an issue worthy of review.

Respondents' characterization of Alabama law, however, is demonstrably false. For more than a century and a half, the Alabama Supreme Court has consistently held that a cause of action does not accrue until there is an

actual injury.[4] The more recent decisions involving the accrual of toxic tort actions have not varied from this ancient rule.[5]

The dissent in this case recognized as much. Justice Harwood, joined by three other justices of the Alabama Supreme Court, emphasized that "Alabama law has *long required* a manifest, present injury before a plaintiff may recover in tort." App. 35 (citations omitted) (emphasis added). Justice Harwood further recognized, moreover, that under Alabama law, petitioner's decedent was effectively stripped of *any* opportunity to file a lawsuit: no matter when he filed the action, it would have been "either too soon or too late." App. 37. In light of these observations, respondents' argument that Mr. Cline could have filed his lawsuit back in 1987, twelve years before he ever became sick from his benzene exposure, fails.

Finally, respondents' argument ignores the nature of Mr. Cline's claims, which arose out of the Alabama Extended

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[4] *See, e.g., Roundtree v. Brantley*, 34 Ala. 544 (1859) (action for flood damage did not accrue when ditch was dug but instead upon subsequent flood damage); *West Pratt Coal Co. v. Dorman*, 49 So. 849, 850 (Ala. 1909) (action for collapse of surface did not accrue during subterranean mining activity but instead upon subsequent collapse of surface); *Payne v. Alabama Cemetery Ass'n, Inc.*, 413 So.2d 1067, 1072 (Ala. 1982) (action did not accrue on negligent destruction of body but instead on subsequent discovery by family).

[5] *See, e.g., Thomas v. BSE Indus. Contractors, Inc.*, 624 So.2d 1041, 1045 (Ala. 1993) (dismissing outrage action brought by individual exposed to asbestos but not yet ill); *Hinton v. Monsanto Co.*, 813 So.2d 827, 831-32 (Ala. 2001) (dismissing action for "medical monitoring" by individuals exposed to polychlorinated biphenyls but not yet ill); *Houston County Health Auth. v. Williams*, ___ So.2d ___, 2007 WL 80797, at *12 (Ala. Jan. 12, 2007) (vacating class certification order because "mere exposure to a hazardous substance resulting in no present manifestation of physical injury is not actionable").

Manufacturer's Liability Doctrine ("AEMLD"). One of the elements of an AEMLD claim, a common law cause of action first announced in 1976, eleven years before Mr. Cline's last exposure to the respondents' benzene, is that the plaintiff must have suffered an actual injury. *Casrell v. Altec Indus., Inc.*, 335 So.2d 128, 132 (Ala. 1976); *Atkins v. American Motors Corp.*, 335 So.2d 134, 141 (Ala. 1976). Thus, mere exposure is insufficient to support an AEMLD claim, and Mr. Cline could not have filed an action against the respondents until 1999, when he first had a "manifest, present injury," acute myelogenous leukemia.

2. Once it is understood that Alabama law deprives tort victims whose injuries do not manifest within two years of exposure of *any* opportunity to file a lawsuit, the remainder of respondents' arguments unravel. Thus, for example, respondents argue that the decision below does not conflict with this Court's prior holdings that a limitations period violates federal due process unless it provides a "reasonable" period of time to file suit, *see, e.g., Terry v. Anderson*, 95 U.S. 628, 633 (1887), because, respondents claim, Mr. Cline could have filed suit in 1987, following his last exposure to benzene. Opposition at 18. As explained above, however, toxic tort victims in Alabama whose injuries do not manifest within two years of their exposure are deprived of *any* opportunity to file suit. This cannot be viewed as "reasonable" under any circumstances, thereby placing the decision below in direct conflict with numerous decisions of this Court.[6]

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[6] Respondents are also incorrect in arguing that this Court has "passed on the opportunity to decide" the issue presented in this case "on at least seven occasions." Opposition at 18. Four of the seven occasions were denials of petitions for writs of certiorari, and it is well

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Respondents fare no better in attempting to deny the conflict between the decision below and the numerous state high-court decisions striking down unreasonably short statutes of limitations on due process grounds. *See* Petition at 16-21. Here again, respondents' main argument is that these cases are distinguishable because "Alabama law . . . provided decedent with a two-year period following his last exposure in which to pursue an exposure related cause of action . . . " Opposition at 21. Because respondents' premise is false, the argument necessarily fails.

Equally unpersuasive is respondents' argument that all the federal cases cited by petitioner that conflict with the decision below, *see* Petition at 22-26, are distinguishable on the ground that "each involve[s] the situation in which a state legislature [as opposed to a court] enacted the law that eliminated or substantially reduced the period within which a party could pursue an existing

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established that "[t]he denial of a writ of certiorari imports no expression upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923). The three remaining cases, which were dismissed by this Court for want of a federal question, are not only of questionable precedential value, *see, e.g.*, *Boggs v. Boggs*, 520 U.S. 833, 849 (1997) (dismissals for want of a substantial federal question are "not entitled to full precedential weight") (citation omitted), but they are all readily distinguishable on their facts. Thus, two of the dismissals involved limitations periods that were determined to have afforded litigants a "reasonable" amount of time to file suit, as opposed to the present case, which involves court-made rules that deprive most toxic tort victims of *any* opportunity to file suit. *See Bunker v. Nat'l Gypsum Co.*, 441 N.E.2d 8, 12 (Ind. 1982); *Anderson v. Wagner*, 402 N.E.2d 560, 567-68 (Ill. 1980). The final case cited by respondents, *Ellerbe v. Otis Elevator Co.*, 618 S.W.2d 870 (Tex. Civ. App. 1981), did not examine the reasonableness of any statutory limitations period, but instead involved the issue of whether or not a statute of repose applied to the named defendant in that case – an entirely different question than that presented here. *See infra* at n.7.

cause of action." Opposition at 23. This is a distinction without a difference: whether the unreasonable reduction or elimination of a limitations period is achieved by legislative action or by judicial fiat, the result is the same: a clear violation of due process.

Respondents' argument that the weight of authority is actually *consistent* with Alabama's regime, *see id.* at 24-26, also lacks merit. Most of the statute-of-limitations cases cited by respondents involve limitations periods in which injured parties had at least *some* opportunity in which to file suit. *See id.* This case, in contrast, involves a situation in which many toxic tort victims have literally *no* opportunity to file suit. In any event, to the extent respondents are correct that there are a host of federal Court of Appeals decisions upholding limitations periods comparable to Alabama's, then there is even more of a conflict below that cries out for resolution by this Court.[7]

3. Finally, respondents argue that "[t]here is no manifest injustice resulting from the decision of the Supreme Court of Alabama" because statutes of limitations are actually designed to protect *defendants*, and that it would be unfair to permit litigants like Mr. Cline to file suit long after his injuries occurred. *Id.* at 28. Here again, respondents duck the real issue in this case, which is not whether Alabama has the right to create some temporal

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[7] Respondent's reliance on certain cases upholding statutes of repose against constitutional challenges, *id.* at 25, is misplaced because, in such cases, the effect of the statute is to ensure that the cause of action never arises in the first place. A statute of limitations operates very differently, however, by cutting off an existing cause of action that has already arisen and thus has become a "species of property" protected by the Due Process Clause of the United States Constitution. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

limitation on the right to sue. Surely, it does. But the question here is whether the Alabama judiciary may, consistent with federal due process, effectively *eliminate* an existing cause of action by announcing bizarre accrual rules that render any attempt to sue either "too soon or too late." App. 37 (Harwood, J., dissenting). The answer to this question is plainly no. Review is warranted to prevent the Alabama Supreme Court from continuing to flout the due process rights of Alabama citizens and square the law in Alabama with the well-settled precedent of this Court.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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